[redacted]

SUPREME COURT OF THE UNITED STATES

[redacted] 1924

No. [redacted] 41

[redacted] POWER CORPORATION, PLAINTIFF IN ERROR,

vs.

[redacted]

(29,546)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 996.

ENDICOTT JOHNSON CORPORATION, PLAINTIFF IN ERROR,

vs.

ENCYCLOPEDIA PRESS, INC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1923.

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SUPREME COURT, APPELLATE DIVISION—THIRD DEPARTMENT

[fol. 1] ENCYCLOPEDIA PRESS, INC., Plaintiff-Respondent,

vs.

ENDICOTT JOHNSON CORPORATION, Defendant-Appellant.

STATEMENT UNDER RULE 234

This action was commenced on the 4th day of October, 1920 by service of summons and complaint therein.

The defendant's answer was served on the 23rd day of October, 1920.

The names of the original parties are as stated in the title above. No change of parties has taken place pending the suit.

[fol. 2] SUPREME COURT, BROOME COUNTY

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

Please take notice, That the defendant, Endicott Johnson Corporation, hereby appeals to the Appellate Division of the New York Supreme Court in and for the Third Department from the judgment entered in the above entitled action in favor of the above-named plaintiff and against the above-named defendant for the sum of One hundred seventy-seven dollars forty-seven cents ($177.47) in the Office of the Clerk of the County of Broome on the fourteenth day of July, 1921, and also from the Findings of Fact and the Conclusions of Law of the Hon. Geo. McCann, one of the justices of this court, dated July thirteenth, 1921, and filed in the Broome County Clerk's office on July fourteenth, 1921, and particularly from that portion of the Findings of Fact, No. 6 which states that an execution against the wages, earnings and salary of said judgment debtor was "duly" issued out of the Supreme Court and from said Conclusions of Law in their entirety.

Dated the eleventh day of August, 1921.

Yours, etc., Maurice E. Page, Attorney for Defendant.

[fol. 3] To the Clerk of the County of Broome and Merchant, Waite & Waite, Attorneys for Plaintiff.

(Endorsed:) Filed Broome County Clerk's Office, August 11, 1921.

NEW YORK SUPREME COURT, COUNTY OF BROOME

[Title omitted]

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of you- failure to appear, or answer, Judgment will be taken against you by default for the relief demanded in the complaint.

Dated, September 15, 1920.

Merchant, Waite & Waite, Plaintiff's Attorneys, Post Office Address and Office, 1101-3 Kilmer Building, Binghamton, N. Y.

[fol. 4] SUPREME COURT, BROOME COUNTY

[Title omitted]

COMPLAINT

Plaintiff complains of the defendant and alleges upon information and belief:

1. That plaintiff is now and was at the times hereinafter mentioned a domestic corporation.

2. That defendant is now and was at the times hereinafter mentioned a domestic corporation.

3. That on July 7, 1919, this plaintiff, Encyclopedia Press Inc., duly recovered a judgment against one Joseph W. Minehan in an action in the Supreme Court of the State of New York, wherein Encyclopedia Press Inc. was plaintiff and Joseph W. Minehan was defendant, upon personal service of the summons and verified complaint upon the defendant in the action, for $63.50 damages and $19.50 costs, aggregating $83.00, the judgment roll whereof was duly filed and said judgment was on that day duly docketed and entered in the office of the Clerk of the County of Broome.

4. That said judgment still remains in full force and effect, not reversed, satisfied, or otherwise vacated, and no part thereof has been paid.

5. That on July 7, 1919, an execution on said judgment against [fol. 5] the property of the said Joseph W. Minehan was duly issued out of the Supreme Court and delivered to the Sheriff of the County of Broome where said judgment debtor Joseph W. Minehan then re-

sided and now resides, and the said sheriff has duly returned said execution to the Broome County Clerk's Office wholly unsatisfied.

6. That thereafter and on the 5th day of November, 1919, an execution against the wages, earnings and salary of said judgment debtor Joseph W. Minehan, under § 1391 of the Code of Civil Procedure, was duly issued out of the Supreme Court on said judgment, pursuant to an order made by Hon. Michael H. Kiley, a Justice of said court, dated the 5th day of November, 1919, and said execution was thereafter and on the 5th day of November, 1919, delivered to the Sheriff of Broome County, where the judgment debtor then resided and now resides.

7. That on the said 5th day of November, 1919, and ever since then the said Joseph W. Minehan has been and now is employed by the defendant Endicott Johnson Corporation, at a regular weekly wage or salary of more than $12.00 per week, and has earned and received the same weekly.

8. That on the said 5th day of November, 1919, the said execution was duly presented to the said Endicott-Johnson Corporation, defendant herein, by the Sheriff of Broome County.

9. That the said defendant Endicott-Johnson Corporation has wholly failed and neglected to pay over to the said Sheriff of Broome County, or to retain out of said judgment debtor's wages, earnings and salary, ten per centum thereof to apply on said judgment, and [fol. 6] has refused to deduct such percentage as directed in said execution and still refuses so to do, although payment thereof has been duly demanded.

10. That a copy of the said execution hereinbefore referred to is hereto annexed, marked Exhibit "A" and made a part hereof.

11. That a schedule marked Exhibit "B" is hereto annexed and made a part hereof, showing the amount of wages, earnings and salary earned by the said Judgment Debtor, Joseph W. Minehan, and paid to him by the said defendant Endicott-Johnson Corporation, during the times hereinbefore mentioned and while the said garnishee execution was outstanding, together with a statement of the amount which should have been deducted therefrom and turned over to the said Sheriff.

12. That there has accumulated and become due on said garnishee execution the sum of $88.81, no part of which has been paid, although payment thereof has been duly demanded as heretofore stated.

13. That no other or prior execution issued as provided for in § 1391 of the Code of Civil Procedure is unsatisfied and outstanding against the wages and salary of said judgment debtor Joseph W. Minehan.

Wherefore, plaintiff demands judgment against the defendant in the sum of $88.81 with interest thereon from the 13th day of September, 1920, besides the costs of this action.

Merchant, Waite, & Waite, Plaintiff's Attorneys, 1101-3 Kilmer Bldg., Binghamton, N. Y.

[fol. 7] EXHIBIT A TO COMPLAINT

The People of the State of New York to the Sheriff of the County of Broome:

Whereas, Judgment was rendered in the Supreme Court of the State of New York, in an action wherein Encyclopedia Press Inc. was plaintiff, and Joseph W. Minehan was defendant, in favor of the said Encyclopedia Press Inc. and against the said Joseph W. Minehan, on the 7th day of July, 1919, for the sum of eighty-three dollars and no cents ($83.00); the Judgment Roll in which said action was on that day filed, and Judgment then docketed, in the County Clerk's Office of the County of Broome; and whereas there is now actually due on the said Judgment the sum of eighty-three dollars and no cents ($83.00), with interest thereon from the 7th day of July, 1919.

And whereas, an execution duly issued out of a court of record to the Sheriff of the proper county upon said Judgement, against the property of said judgment debtor, has been heretofore returned by the said Sheriff wholly unsatisfied, and there still remains unpaid thereon the amount aforesaid, and no execution issued as provided for in Section 1391 of the Code of Civil Procedure is outstanding and unsatisfied against said judgment debtor.

And whereas, There are wages earnings & salary due and owing to the said judgment debtor, and to become due and owing to him to the amount of twenty-four dollars per week from the Endicott-Johnson Corporation, a domestic corporation having its office and principal place of business in the County of Broome, N. Y.

[fol. 8] And whereas, an order has been duly granted by a Justice of the Supreme Court, upon satisfactory proof to him by affidavits and otherwise of said facts hereinbefore stated, directing that an execution issue for the collection of the said amount of said judgment unpaid and unsatisfied, against the said wages, earnings & salary of said Joseph W. Minehan, the judgment debtor and directing the Endicott-Johnson Corporation, the corporation from whom said wages, earnings & salary are due and owing, and will hereafter become due and owing to the said Joseph W. Minehan, the judgment debtor, to pay over to the officer presenting such execution the sum of $2.40 from each week's wages, earnings and salary which are due and unpaid to said Joseph W. Minehan, which shall not exceed ten per centum thereof, from said wages, earnings & salary, now due and the sum of $2.40 each week from the wages, earnings and salary of said judgment debtor, which shall not exceed ten per centum

thereof as the same shall become due until said execution shall be wholly satisfied.

You are, therefore, required to satisfy said judgment out of said wages, earnings & salary, of said Joseph W. Minehan the said judgment debtor, as follows: You will collect from said wages, earnings & salary, now due the sum of $2.40 from each week's wages, earnings and salary which are due and unpaid to said Joseph W. Minehan, which shall not exceed ten per centum thereof, and the sum of $2.40 each week from the wages, earnings and salary of said judgment debtor, which shall not exceed ten per centum thereof from said wages, earnings & salary, as the same shall become due until the said judgment and this execution, and the expenses thereof, are fully satisfied and paid.

[fol. 9] And to return this execution, with your proceedings thereon, to the Clerk of the County of Broome, where said Judgment Roll is filed as aforesaid.

Witness, Hon. Abraham L. Kellogg, one of the Justices of said Court, this 5th day of November, 1919.

F. P. Ockerman, Clerk.

Merchant, Waite & Waite, Attorneys for Plaintiff, 1101-3 Kilmer Bldg., Binghamton, N. Y.

EXHIBIT B TO COMPLAINT

Week ending	Wages.	10%.
Nov. 8, 1919	20.95	2.09
Nov. 15, "	22.36	2.23
Nov. 22, "	25.40	2.54
Nov. 29, "	27.39	2.73
Dec. 6, "	23.30	2.33
Dec. 13, "	23.40	2.34
Dec. 20, "	23.90	2.39
Dec. 27, "	23.91	2.39
Jan. 3, 1920	23.24	2.32
Jan. 10, "	21.40	2.14
Jan. 17, "	23.90	2.39
Jan. 24, "	23.70	2.37
Jan. 31, "	23.90	2.39
Feb. 7, "	23.53	2.35
Feb. 14, "	19.70	1.97
[fol. 10]		
Feb. 21, "	18.90	1.89
Feb. 28, "	17.20	1.72
March 6, "	15.28	1.52
March 13, "	25.90	2.59
March 20, "	23.90	2.39
April 3, "	25.10	2.51

Week ending	Wages.	10%.
April 10, 1920	25.10	2.51
April 17, "	23.66	2.36
April 24, "	27.51	2.75
May 1, "	25.37	2.53
May 22, "	26.26	2.62
May 29, "	24.38	2.43
June 5, "	23.66	2.36
June 12, "	27.03	2.70
June 19, "	26.25	2.62
June 26, "	26.30	2.63
July 3, "	23.55	2.35
July 10, "	26.15	2.61
July 24, "	25.51	2.55
July 31, "	14.06	1.40
August 7, "	21.62	2.16
August 21, "	26.25	2.62
August 28, "	29.23	2.92

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Walter C. J. Magee, being duly sworn, says that he is the Secretary of the Plaintiff in this action, that he is acquainted with the facts stated in the foregoing complaint that the same is true to the knowledge of the deponent, except as to the matters therein stated to be [fol. 11] alleged on information and belief, and that as to those matters he believes it to be true.

Walter C. J. Magee.

Sworn to before me this 22nd day of September, 1920. M. M. Murphy-Drew, Notary Public, Bronx County No. 17, Bronx County Register No. 2226.

Certificate filed in New York County No. 174.
New York County Register No. 2151.
Commission expires March 30, 1922. (L. S.)

NEW YORK SUPREME COURT, BROOME COUNTY

[Title omitted]

ANSWER

The defendant answers the complaint of the plaintiff herein as follows:

First

1. Defendant admits that at the time and times stated in the complaint it was a domestic corporation.

[fol. 12] 2. Defendant also admits that one Joseph W. Minehan has been in its employ since November 5, 1919, that in certain weeks his wages have exceeded $12.00 per week, that what purported to be an execution against the wages of said Minehan was served upon defendant, and that no part of said wages has been paid to the Sheriff of Broome County or retained to apply on a judgment as alleged in paragraphs 7, 8 and 9, respectively of said complaint.

3. Defendant denies any knowledge or information sufficient to form a belief as to the allegations con-ained in paragraphs 1, 3, 4, 5 and 6 respectively of said complaint.

4. Defendant denies that there has accumulated and become due on said garnishee execution the sum of $88.81 or any part thereof as alleged in paragraph 12 of said complaint.

Second

1. The defendant further answering the plaintiffs complaint and as a first affirmative defense thereto alleges that said complaint does not state facts sufficient to constitute a cause of action.

Third

1. The defendant further answering the plaintiff's complaint and as a second affirmative defense thereto alleges upon information and belief that the order referred to in paragraph numbered 6 was issued without sufficient basis therefor and is therefore without authority, null and void.

[fol. 13]

Fourth

1. The defendant further answering the plaintiff's complaint and as a third and separate affirmative defense alleges upon information and belief that the execution purporting to have been issued against the wages of the said Joseph W. Minehan upon the said order referred to in paragraph numbered 6 of the complaint herein, was null, void, inoperative and ineffectual as to and not binding upon the defendant herein; that in form it is irregular, not within the requirements of the law and is null and void.

Fifth

1. The defendant further answering the plaintiff's complaint herein, and as a fourth and separate affirmative defense thereto alleges upon information and belief that the provisions of Section 1391 of the Code of Civil Procedure, under which the so-called garnishee execution referred to in the complaint was issued, and the laws containing the same are unconstitutional and that proceedings thereunder are null, void and of no effect; that the said law and all proceedings thereunder are unconstitutional and contrary to the provisions of the constitution of the United States and of the State of New York for the following reasons, to wit:

(*a*) That there is no general or specific authority contained in the constitution of the State of New York for the enactment of laws for

the issuance of executions against the wages, earnings, salary or income of judgment debtors such as are set out in Section 1391 of the [fol. 14] Code of Civil Procedure and such laws are in derogation of the Common Law.

(*b*) That said laws deprive the judgment debtor against whose wages a garnishee execution is issued of rights and privileges secured to citizens by the law of the land, and of his property without due process of law and without notice, in violation of the Fourteenth Amendment to the constitution of the United States and in violation of Section 1 and Section 6 of Article 1 of the constitution of the State of New York.

(*c*) That in their execution they operate unjustly, inequitably, and unequally as to different persons in that allowance is not made for varying requirements as to necessary family expenses in cases of different individuals, arising from sickness, large number of dependents, loss of time and the like.

(*d*) That the said provisions of law in their execution and application make no allowance for increased cost of living and decreased purchasing power of money and thereby cause such hardship and deprivation of the necessities of life as to render the enforcement of such execution and operation thereof against public policy.

(*e*) That the enforcement of executions under said provisions of law modify and violate contracts between employer and employee without the consent of the contracting parties and without due notice or due process of law.

(*f*) That the appropriation of 10% of a weekly wage of $12.00 or more to the payment of executions against the wages of judgment debtors operates inequitably and against public policy as to persons [fol. 15] whose weekly wages are from $12.00 to $13.31 both inclusive, and unequally in connection with persons whose wages are below $12.00 or above $13.31 in that the deduction of 10% in such cases leaves for the judgment debtor less than the sum of $11.99 which amount the said law actually or presumptively makes exempt, and in effect declares necessary for living expenses.

Wherefore, defendants demand judgment that the plaintiff's complaint be dismissed with costs.

Maurice E. Page, Attorney for defendant, Office and P. O. Address, Sales Building, Endicott, N. Y.

STATE OF NEW YORK,
County of Broome, ss:

Chester B. Lord, being duly sworn, deposes and says that he is an officer of the defendant herein, to wit: its vice-president, and is duly authorized to make this verification; that he has heard read the foregoing answer; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by defendant

is that the said defendant is a corporation and incapable of making an affidavit except through an officer or agent; that the source of deponent's knowledge and the grounds of his belief as to matters in said answer stated to be alleged upon information and belief are [fol. 16] statements made to deponent by officers or agents of the corporation who are familiar therewith.

Chester B. Lord.

Subscribed and sworn to before me this 23rd day of October, 1920. Bruce L. Babcock, Notary Public in and for Cortland County. Certificate filed in Broome County.

SUPREME COURT, BROOME COUNTY

[Title omitted]

FACTS STIPULATED FOR SUBMISSION

This case being #91 upon the calendar of a Trial Term of this Court commencing the 3rd day January, 1921,

Stipulated, by and between the attorneys for the respective parties hereto that this case may be heard and determined by the court upon the following facts which are hereby stipulated and agreed to in the place and stead of offering evidence thereof and that the issues raised by the pleadings herein may be decided by the court as if a regular trial were had, a trial by jury being hereby waived:

[fol. 17] 1. That plaintiff is now and was at the times hereinafter mentioned a domestic corporation.

2. That defendant is now and was at the times hereinafter mentioned a domestic corporation.

3. That on or about the 7th day of July, 1919, a judgment was duly given and rendered in an action in the Supreme Court of the State of New York in favor of Encyclopedia Press Inc., the plaintiff herein and against Joseph W. Minehan, upon proceedings duly had and taken in said court for the sum of $83.00, to wit; the sum of $63.50 damages and $19.50 costs, the judgment roll whereof was duly filed and said judgment was on that day duly docketed and entered in the office of the Clerk of the County of Broome.

4. That on the 7th day of July, 1919, an execution upon said judgment was issued out of the Supreme Court and delivered to the Sheriff of the County of Broome, of which execution a copy is hereto attached, marked Exhibit "C" and made a part hereof; that the said County of Broome was the County in which the said judgment debtor Joseph W. Minehan resided at the date of issuance of said execution and still resides; that said Sheriff returned said execution to the Clerk of the County of Broome on the 15 day of July, 1919; that a

copy of said return of execution is attached hereto, marked Exhibit "D" and made a part hereof.

5. That said judgment at the date hereof has not been reversed, satisfied or otherwise vacated and that the said judgment still remains in full force and effect, and no part thereof has been paid.

[fol. 18] 6. That on the 5th day of November, 1919, there was presented to Hon. Michael H. Kiley, one of the Justices of the Supreme Court of the State of New York, an affidavit of which a copy is hereto attached, marked Exhibit "E" and made a part hereof; that on the 5th day of November, 1919, an order was granted by Hon. Michael H. Kiley, Justice of the Supreme Court, of which a copy is hereto attached, marked Exhibit "F" and made a part hereof, which said affidavit was filed and said order was entered in the Broome County Clerk's Office on said 5th day of November, 1919.

7. That thereafter and on the 5th day of November, 1919, an execution was delivered to the Sh-riff of the County of Broome of which a copy is attached to the complaint in this action, marked Exhibit "A" and is hereby referred to and made a part hereof.

8. That on November 5, 1919, the said Joseph W. Minehan was employed by the defendant Endicott-Johnson Corporation, and that the wages earned and received by said Joseph W. Minehan and paid by Endicott-Johinson Corporation for each week subsequent to November 5, 1919, to and including August 28, 1920, are as shown by a schedule attached to the complaint herein, marked Exhibit "B" and hereby referred to and made a part hereof.

9. That issue was duly joined in this action by the pleadings which are made a part hereof, the facts admitted therein forming part of this submission.

Dated, February 28th, 1921.

Merchant, Waite & Waite, Attorneys for Plaintiff. Maurice E. Page, Attorney for Defendant.

[fol. 19] EXHIBIT C TO FACTS STIPULATED FOR SUBMISSION

The People of the State of New York to the Sheriff of the County of Broome:

Whereas, Judgment was rendered in the Supreme Court of the State of New York, in an action wherein Encyclopedia Press, Inc., was plaintiff, and Joseph W. Minehan was defendant, in favor of the said plaintiff and against the said defendant, on the 7th day of July 1919, for the sum of Eighty-three Dollars ($83.00); the Judgment Roll in which said action was on that day filed, and Judgment then docketed, in the County Clerk's Office of the County of Broome; and whereas there is now actually due on the said Judgment the sum of Eighty-three Dollars ($83.00), with interest thereon from the 7th day of July, 1919.

You are therefore, required to satisfy said judgment out of the per-

sonal property of the said judgment debtor; and if sufficient personal property can not be found, then out of the real property in your County belonging to the said judgment debtor, at the time when said Judgment was docketed in your County, or at any time thereafter; and to return this execution, with your proceedings thereon, to the Clerk of the said County of Broome, where said Judgment Roll is filed as aforesaid, within sixty days after the receipt hereof by you.

[fol. 20] Witness Hon. George McCann, one of the Justices of said Court, this 7th day of July, 1919.

F. P. Ockerman, Clerk.

Merchant, Waite, & Waite, Attorneys for Plaintiff, Binghamton, N. Y.

(Endorsement of execution:) State of New York, Supreme Court, County of Broome. Encyclopedia Press, Inc., vs. Joseph W. Minehan. Execution to Broome County, Merchant, Waite and Waite, Attorneys for Plaintiff, Binghamton, N. Y. Levy $83.00, with interest from the 7th day of July, 1919, besides your fees and poundage, and return this execution within sixty days after its receipt by you, to the Clerk's Office of the County of Broome, N. Y. Merchant, Waite & Waite, Attorneys for Plaintiff. Received July 7th, 1919 at 1.53 o'clock p. m. Bartlett M. Holcomb, Sheriff, by John W. Weeks, His Deputy.

[fol. 21] EXHIBIT D TO FACTS STIPULATED FOR SUBMISSION

Return

July 15, 1919. "Nulla Bona" Bartlett M. Holcomb, Sheriff, by John W. Weeks, Deputy Sheriff. Filed Broome County Clerk's Office July 15, 1919. H. M. M.

EXHIBIT E TO FACTS STIPULATED FOR SUBMISSION

SUPREME COURT, COUNTY OF BROOME

ENCYCLOPEDIA PRESS, INC.,

vs.

JOSEPH W. MINEHAN.

Affidavit for Order for Garnishee Execution.

STATE OF NEW YORK,
County of Broome,
City of Binghamton, ss:

Thomas B. Merchant being duly sworn, says that he is one of the firm of Merchant, Waite & Waite, the attorneys for the plaintiff and

[fol. 22] judgment creditor in the above entitled action, and is duly authorized to make this application.

That on July 7, 1919, judgment was duly recovered, rendered, entered and perfected in the above entitled action in the Supreme Court, in favor of Encyclopedia Press Inc., plaintiff, and against Joseph W. Minehan, defendant therein, for the sum of $63.50 damages and $19.50 costs, amounting in all to $83.00; that said judgment was duly rendered upon personal service of the summons and complaint upon said judgment debtor, and said judgment was duly docketed and the judgment roll filed in the office of the Clerk of the County of Broome, N. Y., on that day; that an execution against the property of said judgment debtor was thereafter and on July 7, 1919, duly issued out of a Court of Record, viz., the Supreme Court, upon said judgment and delivered to the Sheriff of Broome County, where said judgment debtor, Joseph W. Minehan, then resided and yet resides.

That said Sheriff has duly returned said execution to the Broome County Clerk's Office wholly unsatisfied, and that said judgment remains wholly unsatisfied and in full force and effect, not reversed, satisfied or otherwise vacated.

That the amount of said judgment now remaining unpaid and unsatisfied is $83.00, with interest thereon from July 7, 1919.

That wages, earnings and salary are due and owing to said Joseph W. Minehan, the judgment debtor, and will hereafter become due and owing to him to the amount of more than $12.00 per week, as follows: That said Joseph W. Minehan is now employed by the Endicott-Johnson Corporation, a domestic corporation having its of-[fol. 23] fice and principal place of business in the County of Broome N. Y., and that said corporation will hereafter become indebted to said Joseph W. Minehan as long as he continues in said employment, for wages, earnings and salary to be hereinafter performed in the amount of $24.00 per week, which exceeds the sum of $12.00 per week.

That no execution is now outstanding on said judgment and that no execution provided for in § 1391 of the Code of Civil Procedure is unsatisfied and outstanding against the said judgment debtor.

That no previous application for the order applied for on this affidavit has been made to any court or Judge.

That application is hereby made for an order directing the issue of an execution against said wages, earnings and salary under § 1391 of the Code of Civil Procedure.

T. B. Merchant.

Subscribed and sworn to before me, this 31st day of October, 1919. G. C. Morris, Comr. of Deeds, City of Binghamton, N. Y.

[fol. 24] EXHIBIT F TO FACTS STIPULATED FOR SUBMISSION

STATE OF NEW YORK, SUPREME COURT, COUNTY OF BROOME

ENCYCLOP-DIA PRESS, INC., Plaintiff,
against
JOSEPH W. MINEHAN, Defendant.

Order for Garnishee Execution

On the pleadings, proceedings, judgment, execution and return thereof in this action, and on reading and filing the affidavit of Thomas B. Merchant one of the attorneys for the plaintiff herein verified the 31st day of October, 1919, and it appearing to my satisfaction therefrom, that on the 7th day of July, 1919, judgment was duly recovered, rendered, entered and perfected in the above entitled action in the Supreme Court, County of Broome in favor of Encyclopedia Press Inc. plaintiff, and against Joseph W. Minehan, defendant therein for the sum of eighty-three Dollars and no cents.

That said judgment was duly rendered upon personal service of the summons and complaint upon said judgment debtor, and that an execution against the property of said Joseph W. Minehan the judgment debtor, has been duly issued to the Sheriff of the proper county upon the aforesaid judgment, and that said execution has been returned by the said Sheriff wholly unsatisfied, and that said judg-
[fol. 25] ment still remains wholly unsatisfied and in full force, and that the amount of said judgment unpaid and unsatisfied is eighty-three dollars and no cents ($83.00) and interest thereon from the 7th day of July, 1919.

That wages, earnings & salary, are due and owing to said Joseph W. Minehan, the judgment debtor and will hereafter become due and owing to him to the amount of more than twelve dollars per week as follows:

That said Joseph W. Minehan is now employed by the Endicott-Johnson Corporation, a domestic corporation having its office and principal place of business in the County of Broome, N. Y. and that said corporation will hereafter become indebted to said Joseph W. Minehan as long as he continues in said employment for wages, earnings and salary to be hereinafter performed in the amount of $24.00 per week.

That no execution is now outstanding on said Judgment, and that no execution provided for in Section 1391 of the Code of Civil Procedure is unsatisfied and outstanding against said Joseph W. Minehan.

Now, on motion of Merchant, Waite & Waite, Esqs., attorneys for said Encyclopedia Press, Inc. the Judgment creditor

Ordered, that an execution issue for the collection of the said amount of said Judgment now unpaid against the said wages, earnings & salary of said Joseph W. Minehan, the judgment debtor, directing the Endicott-Johnson Corporation, the corporation from

whom such wages, earnings & salary are due and owing and will hereafter become due and owing to the said Joseph W. Minehan the judgment debtor, to pay over to the officers presenting said execution [fol. 26] the sum of $2.40 from each week's wages, earnings and salary which are due and unpaid to said Joseph W. Minehan, which shall not exceed ten per centum thereof, from said wages, earnings and salary, now due and the sum of $2.40 each week from the wages, earnings and salary of said Judgment debtor, which shall not exceed ten per centum thereof, as the same shall become due until said execution shall be wholly satisfied.

Dated, Nov. 5, 1919.

M. H. Kiley, Justice Sup. Court.

SUPREME COURT, BROOME COUNTY

[Title omitted]

DECISION

At a Trial Term of the Supreme Court Held in and for the County of Broome at the Court House in the City of Binghamton, N. Y., Commencing on the 31st Day of May, 1921.

Present: Hon. George McCann, Justice.

In this action, tried before the Court without a jury, I make and file the following findings of fact and conclusions of law:

[fol. 27] *Findings of Fact*

1. That plaintiff is now and was at the times hereinafter mentioned a domestic corporation.

2. That defendant is now and was at the times hereinafter mentioned a domestic corporation.

3. That on or about the 7th day of July, 1919, a judgment was duly given and rendered in an action in the Supreme Court of the State of New York, in favor of Encyclopedia Press Inc., the plaintiff herein, and against Joseph W. Minehan, upon proceedings duly had and taken in said Court for the sum of $83.00 to wit the sum of $63.50 damages and $19.50 costs, the judgment roll whereof was duly filed and said judgment was on that day duly docketed and entered in the office of the clerk of the County of Broome.

4. That said judgment still remains in full force and effect, not reversed, satisfied or otherwise vacated and no part thereof has been paid.

5. That on July 7, 1919, an execution on said judgment against the property of the said Joseph W. Minehan was duly issued out of

the Supreme Court and delivered to the Sheriff of the County of Broome, where said judgment debtor Joseph W. Minehan then resided and now resides, and that the said Sheriff has duly returned said execution to the Broome County Clerk's Office wholly unsatisfied.

6. That thereafter and on the 5th day of November, 1919, an execution against the wages, earnings and salary of said judgment debtor Joseph W. Minehan under Section 1391 of the Code of Civil Pro- [fol. 28] cedure was duly issued out of the Supreme Court on said judgment, pursuant to an order made by Hon. Michael H. Kiley, a Justice of the said Court, dated the 5th day of November, 1919, and said execution was thereafter and on the 5th day of November, 1919, delivered to the Sheriff of Broome County, where the judgment debtor then resided and now resides.

7. That on the 5th day of November, 1919, and ever since then the said Joseph W. Minehan has been and was at the time of the commencement of this action, employed by the defendant Endicott-Johnson Corporation, at a regular weekly wage or salary of more than $12.00 per week and has earned and received the same weekly.

8. That on the said 5th day of November, 1919, the said execution was duly presented to the said Endicott-Johnson Corporation, the defendant herein, by the Sheriff of Broome County.

9. That the said defendant Endicott-Johnson Corporation has wholly failed and neglected to pay over to the said Sheriff of Broome County, or to retain out of said judgment debtor's wages, earnings and salary ten per centum thereof to apply on said judgment, and has refused to deduct such percentage as directed in said execution and still refuses to do so, although payment thereof has been duly demanded.

10. That the following schedule shows the amount of wages, earnings and salary earned by the said judgment debtor Joseph W. Minehan and paid to him by the said defendant Endicott-Johnson Corporation, for each week subsequent to November 5, 1919, to and including August 28, 1920, together with a statement showing ten per [fol. 29] centum of the amount of each weekly payment, the said ten per centum amounting to $89.71.

Week ending	Wages	10%
Nov. 8, 1919	20.95	2.09
" 15, "	22.36	2.23
" 22, "	25.40	2.54
" 29, "	27.39	2.73
Dec. 6, "	23.30	2.33
" 13, "	23.40	2.34
" 20, "	23.90	2.39
" 27, "	23.91	2.39
Jan. 3, 1920	23.24	2.32
" 10, "	21.40	2.14
" 17, "	23.90	2.39

Week ending			Wages	10%
June	24,	1920	23.70	2.37
"	31,	"	23.90	2.39
Feb.	7,	"	23.53	2.35
"	14,	"	19.70	1.97
"	21,	"	18.90	1.89
"	28,	"	17.20	1.72
March	6,	"	15.28	1.52
"	13,	"	25.90	2.59
"	20,	"	23.90	2.39
April	3,	"	25.10	2.51
"	10,	"	25.10	2.51
"	17,	"	23.66	2.36
"	24,	"	27.51	2.75
May	1,	"	25.37	2.53
"	22,	"	26.26	2.62
"	29,	"	24.38	2.43
June	5,	"	23.66	2.36
"	12,	"	27.03	2.70
"	19,	"	26.25	2.62
"	26,	"	26.30	2.63
July	3,	"	23.55	2.35

[fol. 30]

"	10,	"	26.15	2.61
"	24,	"	25.51	2.55
"	31,	"	14.06	1.40
Aug.	7,	"	21.62	2.16
"	21,	"	26.25	2.62
"	28,	"	29.23	2.92

11. That there had accumulated and become due on said garnishee execution on August 28, 1920, the sum of $88.81 no part of which has been paid, although payment thereof has been duly demanded.

12. That no other or prior execution issued as provided for in Section 1391 of the Code of Civil Procedure is unsatisfied and outstanding against the wages and salary of said judgment debtor Joseph W. Minehan.

Conclusions of Law

That the defendant is indebted to the plaintiff in the sum of $88.81 with interest thereon from the 13th day of September, 1920, amounting to the sum of $4.44, in all $93.25, and plaintiff is entitled to recover that sum from the defendant, and judgment is hereby directed accordingly in favor of said plaintiff and against the said defendant, together with the costs of this action.

Dated July 13, 1921.

George McCann, Justice of the Supreme Court.

[fol. 31] SUPREME COURT, BROOME COUNTY

[Title omitted]

JUDGMENT—(Filed July 14, 1921)

The issues in this action having been regularly brought on for trial before Hon. George McCann, a trial by jury having been duly waived, at a Trial Term of this court held at the Court House in the City of Binghamton, in and for said county, commencing on the 31st day of May, 1921, and the decision of said Justice therein having been duly made in writing and filed, which is hereto annexed, by which he finds for the plaintiff for the sum of $93.25,

Now, Therefore, it is Adjudged, pursuant to said decision, on motion of Merchant, Waite & Waite, plaintiff's attorneys that the said plaintiff, Encyclopedia Press Inc. recover of the defendant, Endicott-Johnson Corporation, the sum of $93.25, together with the sum of $84.22 costs of this action, in all amounting to $177.47, for which amount judgment is rendered and that it have execution therefor.

[fol. 32] Judgment dated this 14th day of July, 1921.

F. P. Ockerman, Clerk.

[File endorsement omitted.]

SUPREME COURT, BROOME COUNTY

[Title omitted]

EXCEPTIONS TO FINDINGS—(Filed July 25, 1921)

Take Notice:

The defendant hereby excepts to the Findings of Fact and to the Conclusions of Law of the Court in the above entitled action which was tried before the court without a jury as contained in the Findings filed in Broome County Clerk's Office accompanying its written decision, as follows:

To that portion of Finding of Fact, numbered 6, which states that an execution against the wages, earnings and salary of said judgment [fol. 33] debtor Joseph W. Minehan under Section 1391 of the Code of Civil Proce-ure was "duly" issued out of the Supreme Court on said judgment.

To the Conclusions of Law, and to each and every part thereof.

Dated June 23, 1921.

Maurice E. Page, Attorney for Defendant, Sales Building, Endicott, N. Y.

To Merchant, Waite and Waite, Attorneys for Plaintiff, and to F. P. Ockerman, County Clerk of Broome County, N. Y.

[File endorsement omitted.]

[fol. 34] SUPREME COURT, BROOME COUNTY

[Title omitted]

DEFENDANT'S REQUESTS TO FIND AND DISPOSITION THEREOF—(Filed July 25, 1921)

The defendant hereby requests the court to make Findings of Fact which it considers established by the evidence on the trial of this case before the court without a jury and Rulings or Conclusions of Law, as follows:

Findings of Fact

1. That the plaintiff is now and was at the times hereinafter mentioned a domestic corporation.
Found, G. M., J. S. C.

2. That the defendant is now and was at the times hereinafter mentioned a domestic corporation.
Found, G. M., J. S. C.

3. That on or about the 7th day of July, 1919, a judgment was duly given and rendered in an action in the Supreme Court of the State of New York, in favor of Encyclopedia Press Inc., the plaintiff herein, and against Joseph W. Minehan, upon the proceedings duly had and taken in said court for the sum of $83.00 to wit the sum of [fol. 35] $63.50 damages and $19.50 costs, the judgment roll whereof was duly filed and said judgment was on that day duly docketed and entered in the office of the Clerk of the County of Broome.
Found, G. M., J. S. C.

4. That said judgment still remains in full force and effect, not reversed, satisfied or otherwise vacated and no part thereof has been paid.
Found, G. M., J. S. C.

5. That on July 7, 1919, an execution on said judgment against the property of the said Joseph W. Minehan was duly issued out of the Supreme Court and delivered to the Sheriff of the County of Broome, where said judgment debtor Joseph W. Minehan then resided and now resides, and that the said Sheriff has duly returned said execution to the Broome County Clerk's Office wholly unsatisfied.
Found, G. M., J. S. C.

6. That on the 5th day of November, 1919, there was presented to Hon. Michael H. Kiley, one of the Justices of the Supreme Court of the State of New York an affidavit of which a copy marked Exhibit "E" was attached to the agreed statement of facts and upon the same day the said justice granted an order a copy of which marked Exhibit "F" was attached to said agreed statement of facts and that

the said affidavit was filed and the said order was entered in the Broome County Clerk's Office on the 5th day of November, 1919.
Found, G. M., J. S. C.

7. That on the 5th day of November 1919 an execution, a copy of which marked Exhibit "A" was attached to the complaint, was de-[fol. 36] livered to the Sheriff of the County of Broome and thereafter the said execution was duly served upon the Endicott-Johnson Corporation, the defendant, by the Sheriff of Broome County.
Found, G. M., J. S. C.

8. That on November 5th, 1919 said Joseph Minehan was employed by the defendant, Endicott-Johnson Corporation, and the wages, earnings and salary received by him and paid by Endicott-Johnson Corporation for each week subsequent to November 5, 1919, to and including August 28, 1920 was as shown by schedule marked Exhibit "B" and attached to the complaint.
Found, G. M., J. S. C.

9. That Endicott-Johnson Corporation has not paid over to the Sheriff of Broome County any amount whatsoever to apply on said garnishee execution.
Found, G. M., J. S. C.

Conclusions of Law

1. That the plaintiff's complaint did not state facts sufficient to constitute a cause of action and that on account thereof said complaint should be dismissed and judgment for non-suit entered.
Refused, G. M., J. S. C.

2. That the affidavit upon which the order for a garnishee execution was based was insufficient in law.
Refused, G. M., J. S. C.

3. That the order for a garnishee execution was null, void, inoperative and ineffectual as to and not binding upon the defendant [fol. 37] for the reason among others that the affidavit upon which it was based was insufficient in law.
Refused, G. M., J. S. C.

4. That the garnishee execution was and is null and void for the reason among others that it was based upon an order which itself was null, void and inoperative.
Refused, G. M., J. S. C.

5. That the so-called garnishee law is unconstitutional under Article I Section 6 of the Constitution of the State of New York.
Refused, G. M., J. S. C.

6. That the so-called garnishee law is unconstitutional and in violation of Article I, Section 1 of the Constitution of the State of New York.

7. That the so called garnishee execution is unconstitutional and in violation of the 14th amendment to the Constitution of the United States of America.

Refused, G. M., J. S. C.

8. That the garnishee law in its operation is contrary to public policy and void.

9. That the so-called garnishee execution was invalid and not binding upon the defendant for each of the following reasons:

(*a*) Because the so-called garnishee law under which said execution was issued is unconstitutional under Article I, Section 1 of the Constitution of the State of New York.

(*b*) Because the said garnishee law under which said execution was issued is unconstitutional under Article I, Section 6 of the Constitution of the State of New York.

[fol. 38] (*c*) That the garnishee law under which the said execution was issued is contrary to the provisions of the fourteenth amendment of the Constitution of the United States of America and therefore unconstitutional.

(*d*) That the garnishee law under which said execution was issued is contrary to public policy and void.

10. That the defendant is not indebted to plaintiff in any amount whatsoever and judgment should be and is hereby directed dismissing the complaint with costs.

Refused, G. M., J. S. C.

Maurice E. Page, Attorney for Defendant, Sales Building, Endicott, N. Y.

Found and Refused as indicated, August 8, 1921.

George McCann, Justice Supreme Court.

[File endorsement omitted.]

[fol. 39] SUPREME COURT, BROOME COUNTY

[Title omitted]

DEFENDANT'S EXCEPTIONS TO REFUSALS TO FIND—(Filed Aug. 11, 1921)

This action having been tried before Hon. Geo. McCann, one of the justices of this court, without a jury at a trial term of the court commencing on the 31st day of May, 1921, and the court having been requested by the defendant to make Findings of Fact which it considered were established by the evidence on the said trial and Rulings or Conclusions of Law and the Requests to find certain of the said Conclusions of Law having been refused by the said Justice,

Now Therefore, The defendant hereby excepts to the refusal of the said trial judge to find Conclusions of Law as requested as follows:

Conclusions of Law respectively numbered 1 to 10, inclusive, as contained in the said Request to Find.

Dated, August 11, 1921.

Maurice E. Page, Attorney for Defendant, Sales Building, Endicott, N. Y.

To Merchant, Waite & Waite, Attorney for Plaintiff, and to F. P. Ockerman, County Clerk of Broome County.

[File endorsement omitted.]

[fol. 40] SUPREME COURT, BROOME COUNTY

[Title omitted]

OPINION

Merchant, Waite & Waite for Plaintiff.
Maurice E. Page, Esq., for Defendant.

Memorandum of Opinion

McCANN, *J.:*

This is an action brought by plaintiff against the defendant corporation under the provisions of Section 1391 of the Code of Civil Procedure, to recover the amount of a certain judgment, together with interest and costs thereon, which is the amount of a garnishee execution issued against the wages of one Joseph W. Minehan, an employee of defendant on a judgment theretofore obtained against him by plaintiff herein. The complaint alleges all the conditions precedent to the commencement of this action, and the answer raises several issues mostly conclusions of law. A statement of all the facts have been submitted to the Court with a stipulation that the case be tried and decided thereon.

The only questions which require discussion are the three objections raised by defendant as to the sufficiency of the complaint.

[fol. 41] That the garnishee execution and the affidavit and order upon which it was based, were irregular and not binding on defendant.

I see no irregularity in the affidavit and my attention has not been called to anything on defendant's brief which would suggest the insufficiency of such affidavit.

As to the sufficiency of the garnishee execution, it is claimed that it requires the payment of ten per centum of the weekly wages of the judgment debtor, and does not except those weeks in which such wages were less than $12. I do not read the execution as making any such requirement and if it were so, the sufficiency of such provision I have already passed upon in an Opinion which I have this

day rendered in the action of William H. Smith against the Endicott-Johnson Corporation, to which reference is hereby made.

The second and third points raised by the defendant are that the provisions of Section 1391 of the Code of Civil Procedure are unconstitutional and contrary to public policy. These questions have also been passed upon in the opinion above referred to and require no further comment.

My conclusion, therefore, is that plaintiff has established a cause of action and that it is entitled to recover the judgment asked for in the complaint, together with the costs and disbursements of this action.

Findings of fact and conclusions of law may be prepared accordingly.

Dated July 13, 1921.

George McCann, Justice of the Supreme Court.

[fol. 42] EXCERPTS FROM OPINION OF MCCANN, *J*

(*Excerpts from Opinion of Justice George McCann in the Case of William H. Smith against Endicott-Johnson Corporation* (189 *N. Y. S.*, 673—Sept. 19, 1921), *Referred to in the Foregoing Opinion*).

"The second and third objections are that the garnishee law so-called under which this action is brought is against public policy and that the provisions of such Act are unconstitutional. It is sufficient answer to this to state that both of these questions have been passed upon by the Court of Appeals in this state and the constitutionality and validity of such Act has been sustained.

Laird v. Carton, 196 N. Y. 169.

Breary School v.. Ward, 201 N. Y. 358.

"I therefore pass these three objections without further comment."

"The objection is made also that in one of the causes of action the garnishee order and execution is invalid because it requires the collection of ten per cent of the wages earned by the judgment debtor without making an allowance for those weeks in which such wages might fall below the statutory sum of $12. I see no force to this argument. I think it is a matter of arithmetical computation on the part of the employer and that the order should not be declared invalid because of failure to state as above mentioned that ten per cent shall only be deducted when the amount of such wages equals or exceeds the sum of $12, a week."

[fol. 43] IN SUPREME COURT OF NEW YORK

STIPULATION SETTLING CASE

It is hereby stipulated and consented that the foregoing Case contains all the evidence consisting of stipulated facts and all of appel-

lant's exceptions to Findings of Fact and Conclusions of Law and of all of appellant's exceptions to refusals to find as requested, and that an order may be made by Mr. Justice McCann to whom said case was submitted and by whom it was decided, settling said case and exceptions as therein shown.

Merchant, Waite & Waite, Attorneys for Plaintiff-Respondent.
Maurice E. Page, Attorney for Defendant-Appellant.

IN SUPREME COURT OF NEW YORK

ORDER SETTLING CASE

I, George McCann, the Justice of the Supreme Court to whom the above case was submitted and by whom it was decided,

Do hereby Certify, That the for-going Case contains all the evidence consisting of stipulated facts and all the appellant's exceptions presented during my consideration of the case, and I do hereby settle the foregoing case and exceptions, and I do hereby order it to — filed as settled.

George McCann, Justice Supreme Court.

[fol. 44] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated by and between the parties to this action that the foregoing Notice of Appeal, Complaint, Answer, Decision, Judgment, Requests to Find, Exceptions, Opinion, Stipulation and Order Settling Case as contained in the foregoing Case on Appeal are true copies of the originals and of the whole thereof, and certification thereof pursuant to statute is hereby waived:

It is Also Stipulated, That an order may be made by Mr. Justice McCann to whom said case was submitted and by whom it was decided, that the said Case be filed with the Clerk of the Appellate Division in and for the Third Department.

Merchant, Waite & Waite, Attorneys for Plaintiff-Respondent.
Maurice E. Page, Attorney for Defendant-Appellant.

IN SUPREME COURT OF NEW YORK

ORDER FILING RECORD IN APPELLATE DIVISION

It is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the Third Judicial Department.

George McCann, Justice Supreme Court.

[fol. 45] SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

[Title omitted]

ORDER OF AFFIRMANCE OF APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, Held at the Court House in the City of Albany, N. Y., Commencing on the 15th Day of November, 1921.

Present: Hon. John M. Kellogg, Presiding Justice; Hon. Aaron V. S. Cochrane, Hon. Henry T. Kellogg, Hon. John Woodward, Hon. Charles C. Van Kirk, Associate Justices.

The appeal in the above entitled action having been heard at this Term, now on motion of Merchant, Waite & Waite, attorneys for respondent, after hearing Maurice E. Page, attorney for appellant, it is

Ordered, that the judgment entered in this action in the office of the Clerk of the County of Broome, on the 14th day of July, 1921, [fol. 46] in favor of the plaintiff-respondent and against the defendant-appellant for $177.47 damages and costs, be and the same hereby is in all things unanimously affirmed, with costs of said appeal to the respondent.

Joseph H. Hollands, Clerk.

A Copy. Joseph H. Hollands, Clerk. (L. S.)

SUPREME COURT, BROOME COUNTY

[Title omitted]

JUDGMENT OF AFFIRMANCE

The appeal taken by the defendant from the judgment entered in this action in the office of the clerk of the County of Broome on the 14th day of July, 1921, in favor of the plaintiff-respondent and against the defendant-appellant for $177.47, damages and costs, having been brought to a hearing and heard at a Term of the Appellate Division of the Supreme Court, Third Department, held at Albany, N. Y., commencing on the 15th day of November, 1921, and an order of said Appellate Division having been made and entered, affirming [fol. 47] said judgment with costs of said appeal to the respondent, all the Justices concurring,

Now, on motion of Merchant, Waite & Waite, attorneys for the respondent, it is

Adjudged, that said judgment be and the same hereby is in all things unanimously affirmed and that the respondent Encyclopedia

Press Inc., recover of the appellant, Endicott Johnson Corporation, the sum of $78.95, the costs of said appeal as taxed.

Judgment signed and entered this 3rd day of January, 1922.

F. P. Ockerman, Clerk.

IN THE COURT OF APPEALS

[Title omitted]

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of Broome, ss:

Maurice E. Page, being duly sworn, deposes and says: That he is the attorney for the defendant-appellant in the above entitled action and that he has been the attorney for the defendant at all times since [fol. 48] the beginning of said action and as such attorney is familiar with all the proceed-ngs herein; that no opinion in said action was written by the Appellate Division but an opinion written in another and similar case decided at the same term is in part applicable hereto as hereinafter stated.

Deponent further says that said action was brought under Section 1391 of the Code of Civil Procedure (Section 684 of the Civil Practice Act) because of failure of defendant to honor a garnishee execution issued against the earnings of one Joseph W. Minehan, the judgment debtor, an employee of the defendant, the contention of the defendant being that said Section of the Code is unconstitutional.

Deponent also says that this action is similar in nature and brought under the same Code Section and for the same purpose as another action entitled William H. Smith vs. Endicott Johnson Corporation, that in each of said cases a judgment was obtained against an employee of the defendant because of his failure to pay a creditor, a property execution issued against the judgment debtor was returned wholly unsatisfied, an order for garnishee execution was granted on an affidavit of attorney for plaintiff and garnishee execution issued thereunder, the garnishee execution was served on the employer which refused to honor said garnishee execution contending that the garnishee law, so-called, is unconstitutional, and judgment was obtained by the creditor against the employer, the defendant in this action and in said other action.

Deponent says further that both cases were submitted to the Appellate Division of the Supreme Court at the term commencing on November 15, 1921; that the decision of the Court in both cases was [fol. 49] in affirmance of the judgment against the defendant and in favor of the plaintiff; that in the case of William H. Smith against Endicott Johnson Corporation the Court wrote an opinion but that in the above entitled action no opinion was written; that the issues in the two actions being similar, the reasons for the Court's decision in the one applied equally as well to the decision in the other.

That that portion of the opinion of the Appellate Division in the case of William H. Smith vs. Endicott Johnson Corporation which bears on the question of constitutionality of the said garnishee law is appended hereto.

Maurice E. Page.

Subscribed and sworn to before me this 18th day of Feb. 1922.
Bruce L. Babcock, Notary Public.

[fol. 50] Excerpt from Opinion in Case of William H. Smith vs. Endicott Johnson Corporation

"The appellant contends that the statute, Sec. 1391 of the Code of Civil Procedure, is unconstitutional and offends against public policy. The judgment against the employee was regularly recovered and was valid. The execution issued thereon and returned unsatisfied was the usual and legal process for realizing the amount found due by the judgment. The garnishee execution is simply a remedial process allowed by statute to be issued by the Court; or a Judge of a Court of Record, without notice to the judgment debtor and upon satisfactory proof of the required facts, to collect the amount due on the judgment; but either party may at any time apply to the Court for a modification of the execution. We think the Court of Appeals has passed upon these questions. In Laird v. Carton (196 N. Y., 169) it held that an execution against wages under Section 1391 of the Code of Civil Procedure, can lawfully be issued on a judgment recovered before the amendment of September 1st, 1908, which permitted that such an execution issue on any money judgment. If the statute were unconstitutional the execution could not have been lawfully issued. In Brearly School v. Ward (201 N. Y., 358) the Court passed directly on the constitutionality of this statute, holding that an execution can lawfully be issued, under this section of the Code against the income of a trust fund. Gray, J. dissented, not upon the ground that the law was unconstitutional but on the ground that the statute in question did not affect trusts created prior to its enactment."

[fol. 51] New York Supreme Court, Broome County

[Title omitted]

Notice of Appeal to Court of Appeals—(Filed Feb. 8, 1922)

Please take notice, that the above named Defendant hereby appeals to the Court of Appeals from the judgment in the above entitled action in favor of the plaintiff and against the defendant entered in the office of the Clerk of the County of Broome on the third day of January, 1922, upon an order of the Appellate Division, Third Depart-

ment, affirming the judgment of the Supreme Court in said action, entered in said Clerk's office on the fourteenth day of July, 1921, for the sum of $177.47 damages and costs.

Dated February 4, 1922.

Yours, etc.,

Maurice E. Page, Attorney for Defendant-Appellant.

To Merchant, Waite & Waite, Attorneys for Plaintiff-Respondent, and Clerk of the County of Broome.

[File endorsement omitted.]

[fol. 52] IN THE COURT OF APPEALS

[Title omitted]

STIPULATION WAIVING CERTIFICATION

It is Hereby Stipulated by and between the parties to this action that the foregoing Order of Affirmance of the Appellate Division, Judgment of Affirmance of the Appellate Division, Affidavit of No Opinion referring to opinion in another case, excerpt from opinion in the case of William H. Smith vs. Endicott Johnson Corporation and Notice of Appeal to the Court of Appeals are true copies of the originals and of the whole thereof, and certification thereof pursuant to statute is hereby waived.

Merchant, Waite & Waite, Attorneys for Plaintiff-Respondent.

Maurice E. Page, Attorney for Defendant-Appellant.

[fol. 53] STATE OF NEW YORK, *ss:*

COURT OF APPEALS

Pleas in the Court of Appeals held at Court of Appeals Hall, in the City of Albany on the 15th day of December in the year of our Lord one thousand nine hundred and twenty-two, before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. Barber, Clerk.

Remittitur Dec. 16, 1922.

[Title omitted]

REMITTITUR

Be it remembered, That on the 10th day of March, in the year of our Lord one thousand nine hundred and twenty-two, Endicott Johnson Corporation, the appellant in this cause, came here *unto* the

Court of Appeals, by Maurice E. Page, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Encyclopedia Press, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by Merchant, Waite & Waite, its attorneys.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Maurice E. Page of counsel for the appellant, and submitted by counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the [fol. 54] proceedings in this court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said judgment be affirmed, with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. Barber, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

Albany, Dec. 16, 1922.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal.) R. M. Barber, Clerk.

[fol. 55] At an Adjourned Special Term of the Supreme Court held in and for the County of Broome at the Court House in the City of Binghamton, N. Y., on the 19th day of December, 1922.

Present, Hon. Charles E. Nichols, Justice.

SUPREME COURT, BROOME COUNTY

[Title omitted]

ORDER MAKING JUDGMENT OF COURT OF APPEALS JUDGMENT OF SUPREME COURT—(Filed Dec. 19, 1922)

A final judgment in this action in favor of the plaintiff and against the defendant having been entered in the Broome County Clerk's

Office on July 14, 1921, for $93.25 damages and $84.22 costs, in all $177.47, and the defendant having appealed from said judgment to the Appellate Division of this court in and for the Third Department, and said judgment having been in all things unanimously affirmed, with costs to the respondent, and said order of affirmance of said Appellate Division having been entered in the Broome County Clerk's Office on January 3, 1922, and the defendant having appealed from the judgment of affirmance entered pursuant to said order of affirmance of said Appellate Division to the Court of Appeals and said appeal having been duly argued at the Court of Appeals, and the Court of Appeals having ordered and adjudged that the said judgment appealed from be affirmed with costs to plaintiff, and having further ordered that the proceedings herein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Merchant, Waite & Waite, attorneys for the plaintiff, it is

Ordered, that said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court, with costs to the plaintiff in said Court of Appeals.

Enter in Broome County.

Charles E. Nichols, Justice Supreme Court.

[fol. 56] [File endorsement omitted.]

[fol. 57] SUPREME COURT, BROOME COUNTY

[Title omitted]

JUDGMENT ON REMITTITUR—(Filed Dec. 19, 1922)

A final judgment in this action in favor of the plaintiff and against the defendant having been entered in the Broome County Clerk's Office on July 14, 1921, for damages $93.25, costs $84.22 in all $177.47, and the defendant having appealed from said judgment to the Appellate Division of this court, in and for the Third Department, and the said judgment having been in all things unanimously affirmed, and a judgment of affirmance having been entered in the Broome County Clerk's Office on the 3rd day of January, 1922, and for costs in favor of the plaintiff and against the defendant amounting to $78.95, and the defendant having appealed from the order and judgment of affirmance of said Appellate Division to the Court of Appeals, and the said Court of Appeals having sent hither its remittiture, filed herein on the 19th day of December, 1922, by which it appears that the said Court of Appeals has affirmed the said judgment appealed from, with costs to the plaintiff, and has given judgment accordingly, and has remitted its said judgment to this court to be enforced according to law and this court having, by an order entered in the Broome County Clerk's Office on the 19th day

of December, 1922, ordered that the said judgment of the Court of Appeals be made the judgment of this court, and the plaintiff's said costs in the Court of Appeals having been duly taxed at the sum of $116.24.

Now, on motion of Merchant, Waite & Waite, attorneys for the plaintiff, it is

Adjudged, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court, and the judgment appealed from be and the same hereby is in all things affirmed, and it is

Further adjudged, that the plaintiff, the Encyclopedia Press, Inc. [fols. 58 & 59] recover of the defendant, Endicott Johnson Corporation, the sum of $116.24, the amount of its costs herein as taxed, and that said plaintiff have execution therefor.

Judgment dated this 19th day of December, 1922.

F. P. Ockerman, Clerk.

[fol. 60] [File endorsement omitted.]

[fol. 61] STATE OF NEW YORK, *ss:*

Broome County Clerk's Office

CLERK'S CERTIFICATE

I, Frederick P. Ockerman, Clerk of the said County, and of the County Court and Supreme Court of the State of New York, appointed to be held in and for said County, being Courts of Record, having a common seal, do hereby certify, That the above, annexed and foregoing is a full, true and complete Transcript of the record and proceedings had in the above entitled action as the same appear on file and remain of record in my office.

I Further Certify, That no separate paper containing an Opinion of the Court was filed but that the Opinion of the Trial Court is found at Folios 118 to 123, inclusive, of the case on appeal written by Hon. Geo. McCann, Justice of the Supreme Court before whom the said case was tried which is followed by excerpts from Opinion of the said Justice McCann in a case of William H. Smith against Endicott Johnson Corporation which was tried before Mr. Justice McCann and to which reference is made in the Opinion above referred to.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and courts at the City of Binghamton this — day of April, 1923.

F. P. Ockerman, Clerk. (Seal of Broome County in the State of New York.)

[fol. 62] COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

PETITION FOR WRIT OF ERROR—(Filed Mar. 17, 1923)

To the Hon. Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

The petition of Endicott Johnson Corporation, the appellant above named, respectfully shows:

That your petitioner is a corporation organized and existing under and by virtue of the Laws of the State of New York, having its principal office and place of business in the Village of Endicott, County of Broome and State of New York:

That upon the order of the Court of Appeals of the State of New York dated the 15th day of December, 1922, and the Remittitur therefrom, judgment was entered in this action in the office of the Clerk of the County of Broome, which said Clerk is a Clerk of the Supreme Court of the State of New York for the said County of Broome, on the 19th day of December, 1922; that said judgment so entered affirmed an order of the Appellate Division of the Supreme Court of the State of New York for the Third Department entered in the office of the Clerk thereof on or about the 29th day of December, 1921, and the judgment entered in the office of the said Clerk of the said County of Broome upon the said order on the 3rd day of January, 1922; and said judgment upon said order of the Appellate Division affirmed the judgment of the Supreme Court of Broome County, entered in the office of the Clerk of said County on the 14th day of July, 1921;

That the said Court of Appeals is the highest court in this state in which a decision in this action can be had;

[fol. 63] That the said Endicott Johnson Corporation was and is aggrieved in that in said judgment and proceedings had prior thereto in this case, certain errors were committed therein to its prejudice; and in said action rights, privileges, and immunities were claimed by your petitioner under the constitution and statutes of the United States, and the decision of the said Court of Appeals was against the said rights, privileges, and immunities, especially set up and claimed under the constitution and statutes of the United States,—all of which will appear in detail from the Assignment of Errors filed herein, which are as follows:

I. The trial court, to wit, the Supreme Court of the State of New York, in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the law for the garnishment of wages, under which the execution was issued, is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States of America.

II. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant

defendant's Requests to Find that the said garnishee law under which said execution issued is contrary to public policy and void.

III. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred for the same reasons and each thereof in finding as a Conclusion of Law that the defendant was indebted to the plaintiff in the sum of $88.81, with interest thereon from the 13th day of September, 1920, amounting to the sum of $4.44,—in all, $93.25, and that plaintiff (defendant in error herein), is entitled to recover that sum from the defendant, (plaintiff in error herein), and that judgment be directed accordingly, together with costs of the action, in that by finding such Conclusion of Law it, in effect held that the said garnishee law was not unconstitutional as alleged in the answer of the defendant, (plaintiff in error herein).

IV. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome erred for the same reasons [fol. 64] and each thereof in granting an order directing judgment for the plaintiff, (defendant in error herein).

V. The Supreme Court of the State of New York in and for the County of Broome erred in refusing to dismiss the complaint for the same reasons, and each thereof.

VI. The Appellate Division of the State of New York in and for the Third Department, erred in refusing to direct a dismissal of the complaint in the action below for the same reasons, and each thereof.

VII. The Appellate Division of the Supreme Court of the State of New York in and for the Third Department, erred in affirming judgment of the Supreme Court of the State of New York for the County of Broome hereinbefore referred to, for the same reasons, and each thereof.

VIII. The Court of Appeals of the State of New York erred in not directing a dismissal of the complaint in the action below, for the same reasons, and each thereof.

IX. The Court of Appeals of the State of New York erred in directing that the said judgment of the court below hereinbefore referred to be affirmed with costs, for the same reasons, and each thereof.

Wherefore, Endicott Johnson Corporation prays for the allowance of a Writ of Error to the Supreme Court of the State of New York to the end that the record in said action may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed; and your Petitioner will ever pray.

Endicott Johnson Corporation, by Maurice E. Page, Secretary. Maurice E. Page, Attorney for Endicott Johnson Corporation.

[fols. 65 & 66] STATE OF NEW YORK,
County of Broome, ss:

Maurice E. Page, being duly sworn, deposes and says: That he is an officer, to wit, the Secretary of Endicott Johnson Corporation, the petitioner hereinbefore named; that he is also the attorney for the said Endicott Johnson Corporation.

That he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

Maurice E. Page.

Subscribed and sworn to before me this 16th day of March, 1923. Bruce L. Babcock, Notary Public.

[fol. 67] [File endorsement omitted.]

[fol. 68] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—(Filed Mar. 20, 1923)

And now comes Endicott Johnson Corporation, Plaintiff in Error, and makes and files this its Assignment of Errors.

I. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the law for the garnishment of wages, under which the execution was issued is contrary to the provisions of the Fourteenth Amendment of the United States of America.

II. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the said garnishee law under which said execution issued is contrary to public policy and void.

III. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred for the same reasons, and each thereof in finding as a Conclusion of Law that the defendant was indebted to the plaintiff in the sum of $88.81, with interest thereon from the 13th day of September, 1920, amounting to the sum of $4.44,—in all, $93.25, and that plaintiff (defendant in error herein), is entitled to recover that sum from the defendant (plaintiff in error herein), and that judgment be directed accordingly, together with costs of the action, in that by finding such Conclusion of Law, it, in effect, held that the said garnishee law was not unconstitutional as alleged in the answer of the defendant, (plaintiff in error herein).

[fols. 69 & 70] IV. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome erred for the same reasons and each thereof in granting an order directing judgment for the plaintiff (defendant in error, herein).

V. The Supreme Court of the State of New York in and for the County of Broome erred in refusing to dismiss the complaint for the same reasons, and each thereof.

VI. The Appellate Division of the State of New York in and for the Third Department, erred in refusing to direct a dismissal of the complaint in the action below for the same reasons, and each thereof.

VII. The Appellate Division of the Supreme Court of the State of New York in and for the Third Department, erred in affirming judgment of the Supreme Court of the State of New York for the County of Broome hereinbefore referred to, for the same reasons, and each thereof.

VIII. The Court of Appeals of the State of New York erred in not directing a dismissal of the complaint in the action below, for the same reasons and each thereof.

IX. The Court of Appeals of the State of New York erred in directing that the said judgment of the court below hereinbefore referred to be affirmed with costs, for the same reasons and each thereof.

Endicott Johnson Corporation, by Maurice E. Page, Secretary. Maurice E. Page, Attorney for Plaintiff in Error, Office and P. O. Address: Sales Building, Endicott, N. Y.

[fol. 71] [File endorsement omitted.]

[fols. 72–75] Bond for Writ of Error—(Filed Mar. 20, 1923)

[Omitted in printing]

Approved, Hiscock, C. J.

[fol. 76] Endorsed: Filed Broome County Clerk's Office, Mar. 20, 1923. H. M. M.

[fols. 77 & 78] At Chambers of the Chief Judge of the Court of Appeals, State of New York, at the City of Syracuse on the 17th Day of March, 1923.

Present: Hon. Frank H. Hiscock, Chief Justice.

COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

ORDER FOR WRIT OF ERROR—(Filed Mar. 20, 1923)

Endicott Johnson Corporation, the Appellant above named, having filed and presented to this Court its petition praying for an allowance of a Writ of Error intended to be urged by it, praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States and such other and further proceedings may be had in the premises as may be just and proper upon the consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, it is

Ordered that a Writ of Error be allowed.

In testimony whereof, witness my hand this 17th day of March, 1923.

Frank H. Hiscock, Chief Judge of Court of Appeals, State of New York.

[fol. 79] [File endorsement omitted.]

[fol. 80] WRIT OF ERROR—(Filed Mar. 20, 1923)

UNITED STATES OF AMERICA:

The President of the United States of America to the Supreme Court of the State of New York in and for the County of Broome; Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court on a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said state in which decision could be had in the said suit between Encyclopedia Press, Inc., plaintiff, and Endicott Johnson Corporation, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was

drawn in question of the constitution- of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such clause of the said constitution, statute, treaty or commission; a manifest error had happened to the great damage of the said defendant, as is said and appears by its complaint. We being willing that an error, if any hath been, should be duly corrected and full and speedy justice done in the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and the proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the [fols. 81 & 82] United States, this 17th day of March, in the year of our Lord one thousand nine hundred and twenty three.

R. M. Barber, Clerk of the Court of Appeals of the State of New York.

The above writ is allowed by—

Frank H. Hiscock, Chief Judge of the New York Court of Appeals. (Seal of Court of Appeals.)

[fol. 83] [File endorsement omitted.]

[fol. 84] CLERK'S CERTIFICATE

STATE OF NEW YORK, *ss:*

Broome County Clerk's Office

I, Frederick P. Ockerman, Clerk of the said County, and of the County Court and Supreme Court of the State of New York, appointed to be held in and for said County, being Courts of Record, having a common seal, do hereby certify, That the foregoing are true and correct copies of Original Petition for Writ of Error, Assignment of Errors, Bond for Writ, Order for Writ, Writ of Error to the Supreme Court, respectively, filed in my office on the 20th day of March, 1923, now being and remaining on file in my office and of all thereof, together with the endorsements thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and courts at the City of Binghamton this — day of April, 1923.

F. P. Ockerman, Clerk. (Seal of Broome County in the State of New York.)

[fols. 85 & 86] CITATION AND SERVICE—(Filed Mar. 20, 1923)

UNITED STATES OF AMERICA, *ss:*

To Encyclopedia Press, Inc., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of New York in and for the County of Broome, wherein Endicott Johnson Corporation is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, this seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

[fol. 87] [File endorsement omitted.]

[fol. 88] STATE OF NEW YORK, *ss:*

Broome County Clerk's Office

I, Frederic P. Ockerman, Clerk of the said County and County Court and Supreme Court of the State of New York, appointed to be held in and for the said County, being Courts of record having a common seal, do hereby certify

That the foregoing is a true and correct copy of the original citation filed in my office on the 20th day of March, 1923, now being and remaining on file in my office, and of all thereof, together with endorsements thereon, and proof and acknowledgment of service thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said County and Courts at the City of Binghamton, this 12th day of April, 1923.

F. P. Ockerman, Clerk. (Seal of Broome County in the State of New York.)

[fol. 89] Service of Citation to Encyclopedia Press, Inc. granted by Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York in a- action wherein Endicott Johnson Corporation is plaintiff in error, the original of which Citation was filed in the Office of the Clerk of the Supreme Court in and for the County of Broome on the 20th day of March, 1923 is acknowledged this 20th day of March, 1923.

T. B. Merchant, Attorney for Encyclopedia Press, Inc.

Duplicate Original.

[fol. 90] Filed Broome County Clerk's Office Apr. 12, 1923. H. M. M.

[fol. 91] SUPREME COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of Broome, ss:

Charles E. Johnston, being duly sworn, deposes and says: That he is over the age of 18 years; that on the 20th day of March, 1923, he served the following papers in the action pending between the parties above named upon Merchant, Waite, and Waite, attorneys for the said Encyclopedia Press, Inc.,

Petition for Writ of Error, Bond for Writ of Error, Assignment of Errors, Order for Writ of Error, Writ of Error, Citation

by delivering to and leaving with Lawrence O. Waite, one of the members of the said firm of Merchant, Waite and Waite, true copies of the originals of said papers, which said originals were filed in the office of the Clerk of the Supreme Court in and for the County of Broome on the said 20th day of March, 1923; that upon each of the said papers was a formal notice directed to the said Merchant, Waite and Waite, attorneys for Encyclopedia Press, Inc., and signed by Maurice E. Page, attorney for Endicott Johnson Corporation, that the original thereof was filed in the office of the Clerk of the County of Broome on the said 20th day of March, 1923; that he knew the said Lawrence O. Waite so served to be a member of the firm of Merchant, Waite and Waite, attorneys for the said Encyclopedia Press, Inc.

Charles E. Johnston.

Duplicate Original.

Sworn to before me this 21st day of March, 1923. Bruce L. Babcock, Notary Public.

Filed Broome County Clerk's Office Apr. 12, 1923. H. M. M.

[fol. 92] CERTIFICATE OF LODGMENT

STATE OF NEW YORK, *ss:*

Broome County Clerk's Office

I, Frederic P. Ockerman, Clerk of the said County and County Court and Supreme Court of the State of New York, appointed to be

held in and for the said County, being Courts of record having a common seal, do hereby certify

That there was lodged with me as such clerk on the 20th day of March, 1923, in the above entitled cause

1. Original Bond for Appeal, of which a copy is herein set forth, and

2. Original Writ of Error, as herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said County and Courts at the City of Binghamton this 12th day of April, 1923.

F. P. Ockerman, Clerk. (Seal of Broome County in the State of New York.)

[fol. 93] RETURN TO WRIT

THE UNITED STATES OF AMERICA:

SUPREME COURT OF THE STATE OF NEW YORK

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court of the State of New York in and for the County of Broome in the City of Binghamton this 12 day of April, 1923.

F. P. Ockerman, Clerk of Supreme Court. (Seal of Broome County in the State of New York.)

[fol. 94] Endorsed: Supreme Court of the United States. Endicott Johnson Corporation, Plaintiff in Error, vs. Encyclopedia Press, Inc., Defendant in Error. Writ of Error and Return Thereon.

Endorsed on cover: No. 29,546. New York Supreme Court. Term No. 996. Endicott Johnson Corporation, plaintiff in error, vs. Encyclopedia Press, Inc. Filed April 14th, 1923. File No. 29,546.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1923

No. 291

ENDICOTT JOHNSON CORPORATION

Plaintiff in Error

vs.

ENCYCLOPEDIA PRESS, INC.,

Defendant in Error

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF of PLAINTIFF IN ERROR

STATEMENT

This action was originally instituted in the Supreme Court of the State of New York in and for the County of Broome by Encyclopedia Press, Inc., as plaintiff (Defendant in Error here) against Endicott Johnson Corporation as defendant (Plaintiff in Error here) to recover judgment for the sum of $88.91 with interest and costs claimed to be due from Endicott Johnson Corporation because of its failure to pay over to the Sheriff of Broome County ten per cent of the wages of Joseph W.

Minnehan, an employee of said Corporation, as directed in a garnishee execution issued under certain provisions of Section 1391 of the Code of Civil Procedure of the State of New York and served upon said Endicott Johnson Corporation in respect to an action in which said Encyclopedia Press, Inc., had recovered a judgment against the said Joseph W. Minnehan. The law for the garnishment of wages was contained in Section 1391 of the Code of Civil Procedure of the State of New York and was re-enacted as Section 684 of the Civil Practice Act.

The Garnishee Law.

For convenience of reference the parts thereof relevant to this case are as follows:

> *"Levy upon earnings or income of judgment debtor. 1.* Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor, and upon satisfactory proof of such facts by affidavits or otherwise the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice must grant an order directing that

an execution issue against the wages, debts, earnings, salary, income from trust funds or profits, of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits, due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided.

* * * *

"2. It shall be the duty of any person or corporation, municipal or otherwise to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness, to pay over to the officer presenting the same such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied, and such payment shall be a bar to any action therefor by any such judgment debtor.

"3. If such person or corporation, municipal or otherwise to whom said execution shall be presented, shall fail or refuse to pay

over to said officer presenting said execution the percentage of said indebtednes, he or it shall be liable to an action therefor by the judgment creditor named in such execution and the amount so recovered by such judgment creditor shall be applied towards the payment of such execution."

In the trial court, all facts were stipulated, leaving questions of law only to be decided. The facts in sequence which were the basis of the action as brought in the trial court are briefly summarized as follows:

Joseph W. Minnehan was indebted to Encyclopedia Press, Inc. which procured a judgment against him and issued thereon a property execution which was returned unsatisfied; an order for a garnishee execution against the wages of Minnehan was granted and such execution was issued; no notice of the application for the order or of its entry or of the issuance and service of the execution was given to Minnehan; the execution and a copy of the order were served upon Endicott Johnson Corporation, in whose employ Minnehan was; no part of the wages of Minnehan were withheld and paid over to the sheriff.

Minnehan continued in the employ of the corporation and after the unpaid weekly installments aggregated the amount specified in the execution suit was brought against the employer under the provision of the garnishee law and judgment recovered.

All questions of fact and all questions as to regularity and sufficiency of proceedings down to return of property execution have been conceded or are deemed settled by the courts below.

The validity of the law for garnishee executions is denied, upon the following grounds, as set forth in the answer of the defendant below, (Record, fols 13-16):

* * * "That the provisions of Section 1391 of the Code of Civil Procedure, under which the so-called garnishee execution referred to in the complaint was issued, and the laws containing the same are unconstitutional and that proceedings thereunder are null, void and of no effect; that the said law and all proceedings thereunder are unconstitutional and contrary to the provisions of the constitution of the United States and of the State of New York for the following reasons, to wit:

"(*a*) That there is nó general or specific authority contained in the constitution of the State of New York for the enactment of laws for the issuance of executions against the wages, earnings, salary or income of judgment debtors such as are set out in Section 1391 of the Code of Civil Procedure and such laws are in derogation of the Common Law.

"(*b*) That said laws deprive the judgment debtor against whose wages a garnishee execution is issued of rights and privileges secured to citizens by the law of the land, and of his property without due process of law and without notice, in violation of the Fourteenth Amendment to the constitution of the United

States and in violation of Section 1 and Section 6 of Article 1 of the constitution of the State of New York.

"(c) That in their execution they operate unjustly, inequitably, and unequally as to different persons in that allowance is not made for varying requirements as to necessary family expenses in case of different individuals, arising from sickness, large number of dependents, loss of time and the like.

"(d) That the said provisions of law in their execution and application make no allowance for increased cost of living and decreased purchasing power of money and thereby cause such hardship and deprivation of the necessities of life as to render the enforcement of such execution and operation thereof against public policy.

"(e) That the enforcement of executions under said provisions of law modify and violate contracts between employer and employee without the consent of the contracting parties and without due notice or due process of law.

"(f) That the appropriation of 10 per cent of a weekly wage of $12.00 or more to the payment of executions against the wages of judgment debtors operates inequitably and against public policy as to persons whose weekly wages are from $12.00 to $13.31 both

inclusive, and unequally in connection with persons whose wages are below $12.00 or above $13.3. in that the deduction of 10% in such cases leaves for the judgment debtor less than the sum of $11.99 which amount the said law actually or presumptively makes exempt, and in effect declares necessary for living expenses."

The trial court decided in favor of the plaintiff and judgment was entered against the defendant,—plaintiff in error here (Record, Fol. 31). An appeal was taken to the Appellate Division, Third Department of the Supreme Court of the State of New York and the judgment of the trial court was affirmed (Fols. 46, 47). An appeal was then taken to the Court of Appeals of the State of New York where the judgment was affirmed, whereupon all proceedings were remitted to the Supreme Court. (Return Fol. 54). The case came to this court upon writ of error to the Supreme Court of the State of New York (Record, Fol. 80.)

The assignments of error contained in the proceedings for writ of error as grounds for reversal of the judgment of the Supreme Court of the State of New York are as follows:

I. The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant defendant's Requests to Find that the law for

the garnishment of wages, under which the execution was issued is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States of America.

II. **The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred in refusing to grant defendant's Request to Find that the said garnishee law under which said execution issued is contrary to public policy and void.**

III. **The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome, erred for the same reasons, and each thereof in finding as a Conclusion of Law that the defendant was indebted to the plaintiff in the sum of $88.81, with interest thereon from the 13th day of September, 1920, amounting to the sum of $4.44,—in all, $93.25, and that plaintiff (defendant in error herein,) is entitled to recover that sum from the defendant (plaintiff in error here), and that judgment be directed accordingly, together with costs of the action, in that by finding such Conclusion of Law, it, in effect, held that the said garnishee law was not unconstitutional as alleged in the answer of the defendant, (plaintiff in error here). (fols. 69 and 70)**

IV. **The trial court, to wit, the Supreme Court of the State of New York in and for the County of Broome erred for the same reasons and each thereof in granting an order directing judgment for the plaintiff (defendant in error, here).**

V. The Supreme Court of the State of New York in and for the County of Broome erred in refusing to dismiss the complaint for the same reasons, and each thereof.

VI. The Appellate Division of the State of New York in and for the Third Department, erred in refusing to direct a dismissal of the complaint in the action below for the same reasons, and each thereof.

VII. The Appellate Division of the Supreme Court of the State of New York in and for the Third Department, erred in affirming judgment of the Supreme Court of the State of New York for the County of Broome hereinbefore referred to, for the same reasons and each thereof.

VIII. The Court of Appeals of the State of New York erred in not directing a dismissal of the complaint in the court below, for the same reasons and each thereof.

IX. The Court of Appeals of the State of New York erred in directing that the said judgment of the court below hereinbefore referred to be affirmed with costs, for the same reasons and each thereof.

The said assignments of error my be summarized as follows:

The Trial court erred in that it did not as matter of law dismiss the complaint and direct judgment for the defendant,

First, because the said garnishee law is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Second, because said law is contrary to public policy and therefore void.

Each of the appellate courts erred in that it did not for the same reasons reverse the judgment of the court below.

ARGUMENT

The foregoing assignments of error and the questions arising in connection therewith will be presented under the following propositions:

First: The New York law providing for garnishment of wages is repugnant to the Fourteenth Amendment to the Constitution of the United States.

Second: The law in question for garnishment of wages is contrary to public policy and void.

Third: Plaintiff in error may properly question the constitutionality of the New York garnishee law.

Fourth: A garnishee execution should be deemed a new proceeding, requiring notice to all parties whose rights will be affected, not only from the nature of this proceeding itself, but also from its analogy to similar proceedings for like purposes.

I

The New York Law Providing for Garnishment of Wages is Repugnant to the Fourteenth Amendment to the Constitution of the United States.

The garnishee law was embodied in that part of Section 1391 of the former Code of Civil Procedure of the State of New York which is now Section 684 of the Civil Practice Act. The parts of the law which are material for discussion of this case in this court are set forth on pages 2 to 4 of this brief.

The due process clause of the Fourteenth Amendment is contained in the following excerpt:

"Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within this jurisdiction the equal protection of the laws."

"Due process of law" and "Law of the land" are the same in meaning.

See, Davidson v. New Orleans, 96 U. S., 97.

— — — — —

"By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not law of the land."

Daniel Webster in the Dartmouth College Case (4 Wheaton, 581).

— — — — —

"A corporation is a person within the provisions of the due process clause."

Santa Clara Co. v. Southern Pacific Ry., 118 U. S., 394, (1886).

1. General Definition of Due Process of Law.

"The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are intended to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the Legislative as well as on the executive and judicial powers of the government and can not be so construed

as to leave Congress free to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be two-fold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this Country."

Murray v. Hoboken Land Co., 18 Howard 272, 276, (1855).

In *Hagar v. Reclamation Dist.*, 111 U. S., 701 708, (1883), the Court defined due process of law as follows:

"It is sufficient to observe here that by 'due process of law' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law: It must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause, therefore means that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

"Due process of law simply requires that a party shall be properly brought into Court and shall there have an opportunity to prove any

fact which, according to the constitution and the usages of the common law would be a protection to him or his property."

People v. Supervisors of the County of Essex, 70 N. Y., 228, (1877).

"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard by testimony or otherwise and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of fact or liability be conclusively presumed agaist him this is not due process of law."

Ives v. South Buffalo Ry. Co., 201 N. Y., 271, 293 (1911).

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."

Westervelt v. Gregg, 12 N. Y., 202, 209, (1854).

In the case of *Ochoa v. Hermandez,* 230 U. S., 139, at 161, (1912) the Court speaking through Mr. Justice Pitney, said:

"Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

2. Due process of law requires certain requisites of procedure which are denied by the New York Garnishee Law.

A. Notice: The statute expressly provides that the wages of the judgment debtor may be taken *without* notice.

> "The judgment creditor may apply to the Court in which said judgment was recovered or the Court having jurisdiction of the same *without notice* to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the Court, if a court not of record, a judge or justice thereof, *must issue*, or if a Court of record, a judge or justice *must grant* an order directing that an execution issue against the wages, debts, earnings salary * * * of said judgment debtor." (Italics ours).
>
> Code of Civil Procedure, Sec. 1391.
>
> Civil Practice Act, Sec. 684, Subd. 1.

Language could not be drafted more clearly in defiance of the right to notice guaranteed by the due process clause of the Fourteenth Amendment. Without such a notice the taking of property in the form of wages by the judgment-creditor is confiscation and the Statute, (Section 1391 of the Code of Civil Procedure) authorizing such a taking should be held unconstitutional.

In *Stuart v. Palmer*, 74 N. Y., 183, 188, (1878), the Court said of a law authorizing assessments for street improvements upon abutting land owners without notice:

> "I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owner of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing.

> The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it but by what may, by its authority be done. *The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.*" (Italics ours).

This was said of a tax law where property was being taken for a public purpose. If notice is essential in such a case then *a fortiori* is it requisite when property is being taken to satisfy a private debt.

In the same case (*Stuart v. Palmer*), the Court said further, (p. 191):

> "No citizen shall arbitrarily be deprived of his life, liberty or property. This the Legislature can not do nor authorize to be done. 'Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature (*Weimer v. Bruenbury,* 30 Mich., 201). This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

In *Remsen et al. v. Wheeler,* 105 N. Y., 573, 579, (1887), the Court says:

> "Therefore, in reference to the imposition of these assessments, as in reference to the imposition of other assessments and taxes, the lot owners were entitled at some stage of the proceeding to a notice and an opportunity to

be heard; and unless the law gave them the right to notice and an opportunity to be heard before the board which was authorized to impose the assessment, it was unconstitutional and void for the reason stated in *Stuart v. Palmer*, 74 N. Y., 183."

B. Hearing: Akin to notice is the right guaranteed by Due Process of Law that no one shall be deprived of life, liberty or property without a hearing.

"The Legislature has the right to take away a particular form of remedy, or to give a new one. What is required of such legislation is, that there must be hearing before condemnation, and judgment before dispossession. *Due process of law requires, that a party shall be properly brought into Court, and that he shall have an opportunity when there, to prove any fact which according to the constitution and the usages of the common law would be a protection to him or his property.*" (Italics ours).

People v. Supervisors of the County of Essex, 70 N. Y., 234.

People v. Kempner, 154 App. Div., (N. Y.) 674, (1913).

"It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law with this * * *."

Stuart v. Palmer, 74 N. Y., 191.

"Forfeiture of rights and properties cannot be adjudged by Legislative Acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law."

Cooley, Constitutional Limitations, page 444.

3. Due process of law requires that property shall not be arbitrarily taken from one and given to another.

"It cannot be the subject of doubt that an act of the legislature which provides for an involuntary transfer of property from one person to another, without due process of law, whether with or without compensation, violates the principles of the fundamental law whatever may be the pretext upon which it is founded."

Gilman v. Tucker, 128 N. Y., 190, 199, (1891).

"I think these decisions should be regarded as having settled that point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation is made."

Embury v. Conner, 3 N. Y., 511, 517, (1850).

"It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A and transfer it to B they can take A himself, and either shut him in prison or put him to death" *Taylor v. Porter,* 4 Hill, 146; *Rockwell v. Nearing,* 35 N. Y., 302, 306 (1866).

4. Due process of Law guarantees freedom of Contract:

"It has accordingly been everywhere held that liberty as that term is used in the Constitution means not only freedom of the citizen

from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose subject only to the restraints necessary to secure the common welfare. * * * The right of property, preserved by the constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode or by following any lawful industrial pursuit. * * * *The property which each one has in his own labor is the common heritage, and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty.* In the Fororer case we said: *'The privilege of contracting is both a liberty and a property right and if A is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law and which B, C and D are still allowed by the law to enjoy it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.'"* (Italics ours).

Bracewell v. People, 147 Ill., 66, 71 (1893).

A. The garnishee law subverts contracts between employer and employee. When a contract has been made by which the employer expressly or impliedly agrees to pay the employee stated sums or wages at stated rates for specified periods the granting of an order for an execution against wages, and the issuance of such execution whereby a third party ostensibly becomes entitled to take a percentage of those wages arbitrarily without

notice to employer or employee or an opportunity for either of them to be heard impairs the obligation of the contract, alters its effect and so deprives employer and employee of freedom of contract.

Justice requires that the employer should not be put to the inconvenience and expense of setting apart each week ten per centum of the earnings of each employee whose wages or salary has been garnisheed and of accounting to the sheriff from time to time for the sums of money thus withheld. In a corporation the size of the plaintiff in error with approximately 16,000 employees, additional clerks and records would be necessary for this purpose. The law makes no provision for the payment of the expense of the extra clerical work and accounting necessitated by it and it is not an item of expense which the employer should be asked to bear.

B. The debtor has a legal right to insist that a claim against him shall not be split without his consent.

> "The authorities that are cited hold simply that a creditor cannot split up a single cause of action without the consent of the debtor.
>
> "The reason for this rule is that to permit a cause of action to be divided would subject the debtor to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract and to decline any assignment by which it may be broken into fragments" (*Mandeville v. Welch*, 5 Wheat., 277).
>
> Whittemore v. Judd Linseed and Sperm Oil Co., 124 N. Y., 565, 577, (1891).

"Another rule of the common law is that a debt or entire claim arising out of a single transaction cannot, at the will of the creditor and without the consent of the debtor, be split up by assignment and several suits maintained on it. Since a debtor has a right to pay his debts *in solido*, he has the privilege of refusing to be subjected to suits by several claimants, and no notice of an assignment of part of a debt can destroy this right of the original debtor without his consent."

2 Ruling Case Law, 619.

C. There are many statutes in the various states placing restrictions upon the assignment of wages. The purpose of most of these statutes is to protect the family of the employee from deprivation of the necessaries of life as a result of the advantage sometimes taken of the employee by unscrupulous tradesman. Other statutes of this nature are for the purpose of protecting the employer from the inconvenience above mentioned.

Indiana has a statute which forbids altogether the assignment of future earnings of an employee. This statute was held constitutional and not an unreasonable restraint upon the liberty of the citizen and not to deprive the citizen of his property without due process of law.

In *International Text Book Co. v. Weissinger*, 160 Ind., 349, (1902). The court said:

"A large proportion of the persons affected by these statutes of liberty are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessaries of life, suffering, inability to meet just obligations to others,

and, in many cases may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesman, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to substitute for them an inadequate contract, is often very great. Such assignment would, in many cases, leave the employee or the wage-earner without present or future means of support. By removing the strongest incentive to faithful service—the expectation of pecuniary reward in the near future, their effect would be alike injurious to the employer and to his employee. It is clear that the object of the Act of 1899, *supra*, was to secure protection of wage-earners from oppression, extortion or fraud on the part of others and from the consequence of their own weakness, folly or improvidence. We cannot say that no just ground existed for such legislative interference for so commendable a purpose."

See also

Mutual Loan Co. v. Martell, 200 Mass., 482 (1908); affirmed 222 U. S., 225 and cases cited in 28 L. R. A. (N. S., 1108).

5. Authorities except the courts of the State of New York specifically hold that laws such as the garnishee law in question proceed without due process of law.

The State of New Jersey in the year 1916 passed a Statute (Pamph. L. 1916, p. 242, ch., 113) which provides for the issuing of an execution by order of a judge or court, upon an unsatisfied judgment after the return of a property execution unsatisfied "where any wages, debts, earnings,

salary, income from trust funds or profits are due and owing to the judgment debtor," or "shall thereafter become due and owing to him to the amount of $18.00 or more per week."

The law provides for a garnishee execution against 10% of wages provided they are $18.00 per week or more unless the income of the judgment debtor shall exceed $1000 per year in which case the percentage subject to garnishment rests in the discretion of the judge granting the garnishee order. It will be noticed that the language of this law is practically the same as the language of Section 1391 of the Code of Civil Procedure of New York and that the chief differences between the two statutes are that in the New Jersey Law the earnings of the judgment debtor must be at least $18.00 before any portion of them can be garnished whereas under the New York Law $12.00 a week is sufficient for garnishment, and also that the New Jersey statute gives the judge power in his discretion to issue an order authorizing execution against a larger portion than 10% of the wages of the judgment debtor in cases where his income exceeds $1000 per year.

In the case of *Trapp v. Brown* (91 N. J. Law, 481), decided June 6, 1918, the plaintiff obtained a judgment against the defendant for $710.00 damages, besides costs. An execution having been returned unsatisfied a petition was presented to the justice of the court *ex parte* showing that defendant owned hotel property in Atlantic City from which she received rental of $4250 per year and that there was an installment of rent for said property which was unpaid. The defendant asked the court for an order directing the issuance of an

execution against any sum in the hands of the agents collecting the rents due the defendant from the tenant. An order was granted providing for the issuance of a garnishee execution against the debts and earnings then due or thereafter to become due from said property to the full amount of the judgment until the judgment with costs should be paid. The defendant moved that the order be vacated. The case came before the New Jersey Supreme Court on that motion. The court said:

> *"The act itself is in derogation of the procedure at common law and takes from a debtor and his creditors regardless of priorities, property in invitum and without hearing or a notice thereof to creditors. The procedure, therefore must be in strict compliance with the express requirements of the statute, and no intendment will be made to enable the court or a judge to assume jurisdiction in the absence of the jurisdictional facts properly evidenced. * * * The result may be that upon a mere ex parte application of this nature, without notice or hearing to any party in interest, the vested rights of prior lienors may be eliminated and in effect subverted * * * In such a situation, a party whose interests would be injuriously affected might well insist that there was an absence of due process of law and successfully invoke that provision of the 14th Amendment of the federal constitution as a barrier to the deprivation of his rights"* (Italics ours).
>
> Trapp v. Brown, 91 N. J. L., 481, citing Provident Ins. etc., v. Mayor, etc., of New Jersey (113 U. S., 506); Coe v. Armour Fertilizer Works, (237 *id.*, 413).

On appeal from the judgment that the execution be set aside the Court of Errors and Appeals of New Jersey unanimously affirmed the decision of the lower Court (93 N. J. Law, 171).

Under the subject of *Executions in Corpus Juris,* Volume 23, is a special section numbered 1099½ and entitled "Special Executions against wages and other Credits," which deals with proceedings authorizing executions for the garnishment of wages earned and to be earned in the future without notice to the judgment debtor or an opportunity for a hearing. The Statutes set forth in this Section and the cases which have been compiled and are cited thereunder by the editors of *Corpus Juris* are confined to the States of New York and New Jersey, the statute of no other state being referred to nor any intimation being given in said section that any other state has a law similar in nature to the garnishee laws of New York and New Jersey. The attorney for plaintiff in error has made a careful examination of the Statutes of many jurisdictions and has failed to discover any other states than New York and New Jersey which have a garnishee law authorizing the taking of wages of a judgment debtor or any portion thereof without notice to the judgment debtor or an opportunity given him for a hearing. It appears therefore that New York and New Jersey are alone in this extraordinary, inequitable and unjust method of attachment of wages.

> *"Such a statute is in derogation of the procedure at common law, and takes from the debtor without notice and without a hearing property which, except for the statute, is exempt from execution."*

23 Corpus Juris, Sec. 1099½.

The section in question should be construed in favor of the judgment debtor and employer.

The following statement made of the process of attachment is equally applicable to the instant case:

> "Owing to the statutory origin and harsh nature of this remedy the Section in question should be construed in accordance with the general rule applicable to statutes in derogation of the common law strictly in favor of those against whom it may be employed (*Sharp v. Speir,* 4 Hill, 76, 86)."
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> Penoyer v. Kelsey, 150 N. Y., 77, 80, (1896).

6. The vital questions involved in this case do not seem to have been carefully considered by the New York Courts.

Mr. Justice McCann, before whom this case was tried, stated in his opinion (fol. 42), and Mr. Justice VanKirk, writing for the Appellate Division, of the New York Supreme Court, Third Department, in the case of *William H. Smith v. Endicott Johnson Corporation* (fol. 50), also stated that the question of validity and constitutionality of the act had been sustained by the Court of Appeals and as authority therefor cited the cases of:

> Laird v. Carton, 196 N. Y., 169 (October, 1909);
>
> Brearley School v. Ward, 201 N. Y., 358 (March, 1911).

These are the only two cases relating to the law for garnishee executions which have reached the Court of Appeals in the State of New York, except the case at bar.

We do not think the Court of Appeals gave these cases as broad a scope as stated by Justice McCann and by Mr. Justice VanKirk in the opinions written by them respectively.

The case of *Laird v. Carton* came to the Court of Appeals by permission of the Appellate Division of the Supreme Court in the First Judicial Department, upon two certified questions, of which the second was a question as to the nature of the earnings and is immaterial here.

In the opinion which was written by Mr. Justice Willard Bartlett, he says (p. 171):

> "The first question certified by the Appellate Division is whether such an execution, namely, an execution against the wages, debts, earnings or salary, can lawfully be issued upon a judgment recovered *before* September 1, 1908. Or was the amendment designed to authorize such execution only upon judgment which should be recovered *after* that date."

It is submitted that in neither of these cases did the Court of Appeals pass upon the question of the constitutionality of the garnishee law itself, but that in both the question at issue and the only question decided was whether or not the garnishee law could be given a retroactive effect.

The opinion of Mr. Justice Bartlett relating to the question certified, discussed whether it was the the intention of the legislature to make the amendment retroactive, that is, applicable to judgments recovered *before* the amendment came into effect, and if so, whether such retroactive operation was valid.

These questions were the only questions considered in the Points of counsel in the argument of the case.

Mr. Justice Bartlett, after referring in his opinion to conflicting cases in the lower courts, says (p. 172):

> "We have reached the same conclusion as that arrived at by Mr. Justice Jenks in that case (*Meyers v. Moran*, 113 App. Div., (N. Y.), 427), to wit: that under Section 1391 of the Code of Civil Procedure, as amended in 1908, the Court may allow an execution to issue against wages, although judgment upon which the execution was sought was rendered before the enactment of the amendment."

Mr. Justice Bartlett, after stating that the amendment to Section 1391, Code of Civil Procedure, like the whole section, was a statute dealing with a legal remedy, says (p. 172):

> "As has been pointed out, the phraseology of the amendment does not require us to construe it as applicable only to future judgments. It matters not that when the judgment was recovered an execution could not issue thereon against wages, earnings or salary; it is enough that such an execution has subsequently been authorized. The statutory authorization for its issuance *does not impair the obligation of any contract or affect any vested right;* it merely furnished the judgment creditor with a broader and more effective remedy than the law gave him before. *To this there is no constitutional objection.*" (Italics ours).

It is to be noted that Mr. Justice Bartlett says he has reached the same conclusion as arrived at by Mr. Justice Jenks in the Appellate Division. The opinion of Mr. Justice Jenks contains the following:

"The appeal is based upon the fact that the judgment was entered before the enactment of the statute. The first point made is that if the statute be construed as retroactive, *it impairs the obligation of a contract.* A statute of exemption from an execution is not a contract between the state and the judgment debtor." (Italics ours).

The question of unconstitutionality of the law for the garnishment of wages upon the grounds of lack of due process of law, or lack of notice, or lack of opportunity for hearing, or as being against public policy was not passed upon or even considered in the case of *Laird v. Carton.*

The Points of the counsel in that case did not raise any question as to the unconstitutionality of the law upon those grounds or upon any other grounds, but on the other hand, seem to admit or assume that it was constitutional; counsel addresses his entire argument to the question that the law should not relate to judgments recovered before the law was in effect, *because* it impaired the obligations of contracts, as referred to in the opinion of Mr. Justice Jenks quoted above.

It seems to us that all that was actually decided in the case of *Laird v. Carton* was that the retroactive operation of the law did not violate the obligation of any contract, and that it was not unconstitutional on that account. In any event, that was the only ground upon which the invalidity of the law was attacked.

Upon the examination of all cases in the New York Official Reports that cite the case of *Laird v. Carton,* as listed in Shepard's New York Court of Appeals Citations, it is found that with one excep-

tion all relate to the construction or interpretation of laws or statutes as to their retroactive operation; the one exception relates to the measure of commissions of a judgment debtor. Not one of the cases refers to the general proposition of the constitutionality or unconstitutionality of the law authorizing garnishee executions, upon the grounds claimed in this case.

In the case of *Brearly School v. Ward*, substantially the same question was certified to and considered by the Court of Appeals, except that the question related to income from a trust fund. Prior to the amendment of 1908 income from trust funds was not subject to garnishment, but was made so by that amendment.

The only question in the case was whether such execution could be issued against the income of a trust created *before* the amendment, upon a judgment recovered *after* the amendment. That this was the only question involved is evidenced by the statement contained in the prevailing opinion in that case that, *"The appellant concedes* that Section 1391 as thus amended is applicable to the income from trusts which have come into being since the amendment" (p. 361).

II.

The Law in question for garnishment of wages is contrary to public policy and void.

1. The highest and most important duty imposed upon man in organized society is the support of his family.

A. This duty has its foundation in natural law.

Upon no one but the parents should devolve the duty of caring for helpless children. They are responsible for bringing these children into the world and society should not be called upon to perform this duty.

Fortunate for the child and for the race that parental love and not obedience to legal enactments prompts this care. Parents that do not care for their children are called unnatural. No exception to this is found in the history of civilized peoples. Were it otherwise, the race would soon become extinct. The same law prevails through all stages and phases of animal life, from the lowest to the highest.

B. Laws in force in this state as well as in every civilized nation, adopted to aid and compel the performance of this duty, as well as to punish the wilful nonperformance thereof, are further evidence of this exalted duty.

(*1*) Certain necessary articles of food, clothing, bedding and furniture, with allowance for needs for a specified future period are exempt from levy and execution under New York laws, (Sections 1390 and 1391, Code of Civil Procedure; Section 665, Civil Practice Act). Many of these exemptions have been found in the laws of the colony and State of New York for nearly two hundred years. These exemptions are made not only in recognition of the duty of the householder to support his family and his absolute right to have reasonable ways and means of fulfilling this duty without molestation from creditors, but also the absolute right of his wife and children to live in comfort and peace.

"From this origin and beginning through a series of amendments and additions has grown the present statutes upon the subject of exemptions for the benefit of widows and minor children, upon the one hand, and from executions against judgment debtors upon the other. An examination of the various enactments upon this subject will disclose that, while the policy of referring to the exemption articles enumerated in the one statute for the purpose of disclosing what were exempted under the other did not long continue, the statutes upon the two subjects from thenceforth grew up together, each embracing and exempted the same articles so far as warranted by the circumstances, and carrying out the same general policy—the protection of the family."

Matter of Keough, 42 Misc., (N. Y.), 394, (1904).

(2) In proceedings supplementary to execution which can be instituted only after the issuance of an execution against the property, and are not usually instituted until after the return of such execution unsatisfied, there is a special provision that the earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding cannot be reached when it is made to appear by his oath or otherwise that those earnings are necessary for the use of a family wholly or partly supported by his labor.

New York Code of Civil Procedure, Sec. 2463.

New York Civil Practice Act, Sec. 777.

In such proceedings, disposal of such earnings necessary for the support of debtor's family after service on the judgment debtor of an order for

examination with its usual accompanying injunction against disposal of his property is not in violation of such injunction order and the debtor cannot be adjudged guilty of contempt of Court therefor.

Hancock v. Sears, 93 N. Y., 79.

Murray Hill Co. v. Kuhnle, 58 Misc., (N. Y.), 313, (1908).

Referring to Section 2463 of the New York Code of Civil Procedure in the case of *Matter of the Trustees of the Board of Publication and Sabbath School Work, Judgment Creditor, for the examination of William J. Harsha, defendant and Judgment debtor,* 22 Misc., (N. Y.), 645, (1898), the Court said:

> "The intent of the legislature is plain. Debtor's duty to his family is recognized so far that, if he has a family wholly or partly supported by his labor, he may if necessary, always have sixty days back earnings exempted and in *Miller against Hooper,* 19 Hun, (N. Y.), 394, it was held that this was a humane provision and should be liberally construed in favor of the debtor."

(3) In the so-called judgment-creditor's action which likewise cannot be begun until the return of an execution wholly or partly unsatisfied, there is also the same provision that the earnings during such period of sixty days prior to the commencement of the proceedings cannot be reached if the judgment debtor shows that such earnings are necessary for the use of a family which is wholly or partly supported by his labor.

New York Code of Civil Procedure, Sec. 1879.

New York Civil Practice Act, Sec. 1196.

These provisions of law were made for the protection of the family and have been in force in this state for half a century or more.

(*4*) In New York failure of a husband to provide for his wife, or of parents to provide for their children makes them subject to specific liabilities and penalties.

(*a*) For failure of husband to provide for his wife the law of this state gives the wife a right of action for separation, while in many other states such failure is deemed and is made a sufficient ground for an absolute divorce.

(*b*) Persons who actually abandon their wives or children without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means, are disorderly persons (New York Code of Criminal Procedure, Sec. 899).

Summary proceedings may be taken to compel a husband to support his wife and family, and security therefor may be demanded and if not furnished, he may be committed (New York Code of Criminal Procedure, Secs. 899-901).

(*c*) A person who wilfully omits without lawful excuse to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor is guilty of a misdeameanor.

(Section 482, New York Penal Law).

(*d*) A parent, or other person, charged with the care or custody for nurture or education of a child under the age of sixteen years, who abandons

the child under destitute circumstances and wilfully omits to furnish necessary and proper food, clothing or shelter, for such child, is guilty of felony (Section 480, New York Penal Law).

(*c*) A parent, or other person having the care or custody for nurture or education of a child under fourteen years, who deserts a child in any place with intent wholly to abandon it, is punishable by imprisonment in a state prison for not more than seven years (Section 481, New York Penal Law).

2. The law of this sate garnisheeing future wages and earnings may deprive the debtor's family of necessaries.

A. The Court will take judicial cognizance that there are cases in which the family cannot be properly supported by the earnings of its head.

Among the factors producing such inability are:

(*1*) The family may be large, consisting of a wife and several children.

(*2*) The husband's wages may be small because of ill health, lack of strength or skill, irregularity of work and many other causes.

(*3*) There may be sickness in the family, necessitating extra expenses for medical attendance, nurse, nourishing food and domestic help.

(*4*) The cost of food and clothing may advance abnormally without corresponding advance in wages.

B. It is absurd to fix $12.00 per week, which is named in the law, as a minimum wage, of which one-tenth is sought to be taken to apply on the judgment.

As stated above, the earning power of the head of the family may be small and the family may be large; yet if he earns the bare $12.00 per week, the sum of $1.20 is to be taken by the provisions of law to apply on the execution, leaving $10.80 per week with which to pay for rent, fuel, fool and clothing, and perhaps bills of a doctor and a nurse. Whatever may be said as to its sufficiency when that amount was fixed by the amendment of 1908, it has so remained ever since—a period during which the cost of rent, fuel, food and clothing has increased from 50% to 200% and even 300% or more.

The absurdity and incongruity of the operation of the law are apparent and need no further comment.

A concrete example, based on actual facts shows its incongruity. In at least one case when a garnishee execution was served in respect to the wages of an employee of the plaintiff in error whose wages paid at the regular rate for the kind of work he was able to do were insufficient to support his large family, the plaintiff in error had been paying from funds set aside for sick and poor relief a substantial sum each week for about one year so that the wife and children might have suitable food and clothing.

C. The restrictive provisions of the law leave no latitude or discretionary power to make modifications for exceptional cases.

Under provisions of the so-called garnishee law of New York, as contained in Section 1391 of the Code of Civil Procedure and Section 684 of the Civil Practice Act, in those cases where the facts make it applicable, "the creditor may apply to the

court in which said judgment was recovered or to the court having jurisdiction of the same *without notice to the judgment debtor,* and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof *must issue,* or if a court of record, a judge or justice *must grant* an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor." (Italics ours).

The impossibility of latitude or the exercise of discretion arises from two causes:

(*1*) The application is *ex parte,*—made without notice to the judgment debtor; he knows nothing of it and has no opportunity to state to the judge or to the court what the necessities of his family are.

(*2*) No discretion is given to the judge or to the court to withhold an execution or an order therefor or to postpone its operation or to decrease the amount collectible below ten per cent authorized by the law. The language is clear and unequivocal that the judge or justice or the court *must issue* the execution, or must grant the order therefor.

3. The New York garnishee law is inconsistent with settled law of nearly all states that process can reach only property that is in existence when process is served and only choses in action that are due and is therefore contrary to public policy.

"It has been laid down as a guiding principle that the validity of process of garnishment depends upon the state of facts existing

at the time of the service of the writ (*Hancock v. Colyer*, 99 Mass., 187). Hence, some courts have asserted that an indebtedness is not subject to garnishment unless it be past due (*Davis v. Effinger*, 18 Cal., 378; *Halker v. Hennessey*, 143 Mo., 88). On this principle wages not yet due have been held not subject to garnishment (*Foster v. Singer*, 69 Wis., 392)."

12 Ruling Case Law, 779.

4. Public policy as crystallized in the laws of modern civilized nations precludes the imposition of a lien upon future earnings, especially if without notice to the debtor and in disregard to the needs of his family.

A. Public policy not only permits, but demands reasonable exemptions from execution.

(*1*) "Statutory provisions creating exemp-emptions have always been considered as founded on public policy. The right to create exemptions must reside in every state to enable it to secure its citizens from unjust and harassing litigation and to protect them in those pursuits which are necessary for the existence or the well being of the community."

11 Ruling Case Law, p. 489.

(*2*) "Exemption laws are enacted to prevent the unfortunate citizen from having all the necessaries of life swept away and to preserve for him certain things reasonably necessary to enable him to earn a livelihood for himself and family. The sole purpose of all such laws is to protect the citizens of the state from being reduced by financial misfortune to absolute want, and to encourage industry and thrift and the building up of homes by placing beyond the reach of creditors; the homestead

and such tools, implements, or appliances as a man may require to prosecute his business, whatever his walk in life or his occupation may be. *Every man, even the extravagant and improvident, owes a first duty to those immediately dependent upon him.* And so it is that the state has an interest that no citizen shall be reduced to a condition of destitution so as to be prevented from prosecuting useful industrial employments for which he may be fitted, and that families shall not be deprived by extravagance or misfortune of the shelter and comforts necessary to health and activity." (Italics ours).

11 Ruling Case Law, 491-492.

B. Waiver of exemptions is held void in most jurisdictions as contrary to public policy.

"The better reasoning and weight of authority support the proposition that a contract made at the time of incurring an indebtedness waiving the debtor's right to exemptions is contrary to public policy and invalid. The statutes which allow a debtor being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity to a limited amount, are based upon views of policy and humanity which would be frustrated if an agreement waiving his right could be sustained. If effect should be given to such agreements, it is likely that they would be generally inserted in obligations for small demands, and in that way the policy of the law would be completely overthrown. Because of a disposition on the part of some to take undue advantage of another's extremity and because also of the readiness of men, under pressure, to make contracts which may deprive them and their families of articles

indispensable to their comfort, the legislature has most wisely interposed."

11 Ruling Case Law, 543.

C. The Constitution and Laws of other Jurisdictions forbid the taking of wages by garnishment.

(*1*) So far as we can find no state except New York and New Jersey assumes authority, by any proceeding to reach, or the advisability of attempting to reach future earnings of a worker.

In this case before this court on this appeal the right and advisability of attempting to reach future wages is honestly contested on the ground of unconstitutionality and as against public policy as hereinbefore fully set forth. In New Jersey the right and advisability of attaching future earnings of a worker is questioned by the courts of that State as fully explained and hereinbefore set forth at pages 22 to 25 of this brief.

(*2*) The Statutes of the United States distinctly prohibit the taking of earnings of seamen for debt.

"No wages due or accruing to any seaman shall be subject to attachment or arrestment."

Act March 4, 1915, Ch. 153, Sec. 12; 38 Statutes, 1169.

(See also Barnes Federal Code, Section 7555.)

"No sum exceeding $1.00 shall be recoverable from any seaman by any person for any debt contracted during the time such seaman was actually belonging to any vessel until the voyage for which the seaman was engaged was at end."

U. S. R. S. Sec. 4537, Act July 20, 1790, Ch. 29, Sec. 4.

(See also Barnes Federal Code Sec. 7556).

"Under the Statutes pertaining to garnishment of wages or salary the rule is well recognized that wages or salary not earned or due at the time of the service of the process cannot be reached.

"Thus, the wages of a seaman cannot be reached by garnishment or trustee process before the voyage on which they are earned is terminated."

20 Cyc., 1007, (Citing 12 Pick., 105).

(*3*) The Constitution of the State of Texas specifically forbids the passage of laws for the garnishment of wages of workers.

"No current wages for personal services shall ever be subject to garnishment."

Constitution of Texas, Art, 16, Par. 28.

Revised Statutes of Texas, 1895, Article 252.

Wages earned during specified periods before service of process, or in specific amounts, or both, are exempt from execution under the laws of all or nearly all of the States of the Union.

The following are some of the provisions of the laws of some of the states in relation to executions against wages as shown by a partial examination of their statutes by counsel.

(*a*) In Iowa, Kansas, Ohio, Oklahoma and Wisconsin, the earnings of workmen and wage earners are exempt from execution for a period of 90 days.

McClain's Annotated Code of Iowa, Sec. 4299.

Revised Statutes of Ohio, Par. 6489.

Revised Statutes of Oklahoma, Par. 3343, Subdv. 16.

(*b*) In New York, (under proceedings supplementary to execution and in judgment creditor's actions), in the case of householders, and in South Carolina the earnings of wage earners are exempt from execution for 60 days.

Civil Practice Act of New York, Sections 773 and 1189.

South Carolina Code, Section 317.

(*c*) The earnings of wage earners are exempt from execution for a period of 30 days in Maine, Missouri, Minnesota, Montana and Oregon.

(*d*) The earnings of wage earners are wholly exempt from execution in Georgia, Louisiana, Pennsylvania and Texas.

Code of Georgia, Sec. 3554.

Louisiana Statutes 1876, No. 79.

Pennsylvania Laws of 1845, Par. 5.

Purdon's Digest of Laws of Pennsylvania, page 1540.

Constitution of Texas, Art. 16.

Revised Statutes of Texas, 1895, Art. 252.

(*e*) Earnings of wage earners in various amounts are exempt in various states as follows:

In Nebraska, to the extent of $500.

Nebraska Code of Civil Procedure, Par. 21.

In Missouri, to the amount of $300.

Missouri Revised Statutes, 1899, Par. 3435.

In Oklahoma, to the amount of $150.

Oklahoma Revised Statutes, Par. 6489.

In Mississippi and Washington, to the amount of $100.

Statutes of Mississippi, 1880, Par. 1244.

R. & B. Code of Washington Laws, Par. 703.

D. Decisions of the courts of various states show sufficient grounds for the policy of exempting wages.

"It was the obvious purpose of this act to enable laborers and persons in public or private employment to receive from their employers compensation for their personal services without hindrance from their creditors. The miner who is paid by the ton, the mechanic who is paid by the piece, and the clerk or salesman who is paid by commissions on his sales, are as much within its protection as if they were paid by the day, week, month or year."

Hamberger v. Marcus, 157 Pa., 133, 136.

"It is not difficult to discern the reasons which influenced the legislative mind in enacting the proviso. (Pa. Act of 1845). Doubtless they meant it should operate as an exemption law for the benefit of the families of laborers and salaried officers, and quite likely they had in view besides the very inconvenience pointed out and lamented by the judge below, that of manufacturers and other large employers being harassed with attachment executions from neighboring justices of

> the peace, complicating accounts, accumulating costs, and depriving them of the laborers on whom they depended, by diverting wages from the current support of the laborer's family to the paying of former debts."
>
> Firmstone *et al.* v. Mack 49 Pa., 387, 392.

In the case of *Firmstone v. Mack* (*supra*), the right of an employee to waive the statute exempting his wages from garnishment was also before the court and the language of the court in the opinion shows the policy of the law in this respect.

> "We have never decided that a debtor may repeal the proviso of the Act of 1845, and public policy pleads strongly against such a decision. If we make it, we bring on the litigation which has sprung out of our decision upon the Act of 1849—the inconvenience to employers before adverted to and the temptation to weak debtors to beggar their families in behalf of sharp and grasping creditors. We will not therefore, strain the proviso to fit it to our construction of the exemption statutes, but will leave it to its natural operation as it is expressed. The legislature having said that justices shall not attach wages, we will say that they shall not, though a particular debtor has said they may. It is to be observed that the garnishee has his rights in the premises, and he is under the Act of Assembly, but is not a party to the agreement which his laborer makes with a creditor. Why should he be annoyed and subjected to costs, his work hindered and his hands deprived of their daily bread by an agreement between others to which he was not a party, and of which he had no notice? Why should such an agreement be made a rule of law to garnishees instead of a statute which they knew of when they made their business

arrangements and employed their laborers, and which they had a right to expect would be administered as it is written?"

In Little v. Balliette, 9 Pa. Superior Court, 411, 413, the Court says:

"The Act of 1845 is frequently spoken of, for convenience sake, as an exemption law and in a sense it is such, but more broadly it is a law forbidding the taking of jurisdiction by attachment over the subject matter. It was not intended to confer a personal privilege upon laborers merely, but was enacted for the protection of their employers as well. For this reason, as well as upon grounds of public policy, it was held that the laborer could not waive its provisions, and thereby subject his employer to a liability to the expense and annoyance of attachments."

III.

Plaintiff in error may properly question the Constitutionality of the New York Garnishee Law.

1. Rights of plaintiff in error guaranteed by the Fourteenth amendment of the constitution of the United States will be violated if the judgment of the Supreme Court of the State of New York is affirmed.

A. There is a violation of its right to freely contract with its workers.

Beginning with Subdivision 4 on page 18 of this brief and continuing to page 21, it is shown that freedom of the employer and employee to contract is one of the rights guaranteed by the due process of law clause of the Federal Constitution, that a law which steps in and says to the employer,

that he cannot pay his worker the amount and at the times he had theretofore agreed to pay him, but that he must pay a portion of the agreed amount to the sheriff when he demands it for the judgment creditor, certainly leaves the employer far from free in his right to contract with his employee.

B. If an employer in New York State recognizes a garnishee execution and retains and turns over a portion of an employee's wages to satisfy the claim of a judgment creditor he does so at his peril.

The garnishee statute has been interpreted and enforced by the lower courts of New York as though it were valid. In fact, there was no other position for these courts to take until the issue of unconstitutionality upon the grounds stated in this case has been squarely raised and settled in a case which raises this issue clearly. As shown in sub-head F of General Head I of this brief, this issue does not seem to have been carefully considered by the courts in the jurisdiction where this case arose. The courts of the state of New Jersey, which is the only state except New York having such a law for garnishment of wages, clearly intimate that such law is repugnant to the due process clause of the fourteenth amendment. Until the question has been squarely presented to and has been carefully considered by the highest courts there is no safe ground that the law is constitutional nor does it create a presumption of constitutionality, for at any time when the issue of constitutionality has been properly raised, the statute may be held unconstitutional.

(*1*) An unconstitutional statute is not a law and can create no rights or duties.

In the case of *Newell v. People*, 7 N. Y., 9, 94, (1852), the court says:

"Leaving these matters without further observation, let us turn to the main question, which we are called upon to examine. The people of this state, in the exercise of their underived and sovereign authority, established a constitution. As part of the machinery of government under it, they created a Senate and an Assembly, and vested in them the legislative power of the state. The authority of the legislature is not inherent, but is entirely derived from and subordinate to the constitution. 'The constitution is the basis of legislative authority; it lies at the foundation of all law and is a rule and commission by which both legislators and judges are to proceed' (2 Dall. 304). *If, therefore, an act of the legislature is contrary to any provision of the constitution, it cannot possess the force of law. Ever since the formation of constitutional governments, this principle has on all proper occasions been asserted and enforced, by the courts, and is now one of the acknowledged maxims and fundamental rules of the law.*" (Italics ours).

In the *Case of Norton v. Shelby County*, 118 U. S. 425, (1885) in a suit brought by the owners and holders of bonds issued by the Board of Commissioners of Shelby County, Tennessee, holding office under an act which had been held by the Supreme Court of Tennessee to be unconstitutional, Mr. Justice Field made this classic statement:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Mr. Justice Chase, in *Van Antwerp v. State of New York,* 218 N. Y., 422 at 427; (1916) said, in speaking of an unconstitutional statute:

"The act of 1906, being unconstitutional, did not constitute legal authority for any act done pursuant to its terms. The respondents, in annexing and cancelling the stamps in question, destroyed their own property, and such cancellation and destruction constituted a complete loss to them and not to their customers * * * The cancellation of the stamps did not constitute a sale to the customers, nor create a legal claim that the respondents could in any way enforce against them."

"No rights may be based on, nor may any duties be imposed by an unconstitutional statute."

12 Corpus Juris, 801.

"The interpretation given to a statute or constitutional provision by a court of last resort is binding on all departments of the government, including the legislature, and a decision by such a court that a statute is unconstitutional has the effect of rendering such statute absolutely null and void, from the date of its enactment and not only from the date on which it is judically declared unconstitutional."

12 Corpus Juris, 800, Sec. 228.

"An unconstitutional law is absolutely void and therefore no law at all. It is the same as if the law had never been passed."

Cleveland v. City of Watertown, 99 Misc., (N. Y.) 66, 69, (1917).

(2) It follows from sub-point (1) that if the garnishee law at any time is held to be unconstitutional, and if the plaintiff in error had withheld any portion of the wages of its employee, or employees, and paid it to the sheriff, for the judgment creditor, it will have done so in compliance with a statute, which is then declared a nullity, a statute which is "absolutely void and no law at all." It also follows that the defendant will have retained for a judgment creditor and turned over for his benefit moneys which properly belong to the employee, and which, therefore, the employee may recover from the defendant in an action brought by him. Clearly, payments of the worker's wages made to or for a judgment creditor by the defendant can in no way relieve the defendant-employer from his duty to pay wages regularly to the employee in accordance with the contract or understanding entered into with the worker when he entered upon his employment.

Obviously, therefore, the defendant-employer has an interest in this action and should be permitted to raise objections to the constitutionality of the statute in question. If the employer does not resist the demand of the sheriff for payment of a portion of the wages garnisheed, and if in an action brought by the judgment creditor the employer does not appear and defend its rights, in what other way can it secure for itself the protection granted to it under the due process clauses of the State and Federal constitutions?

See: Second National Bank v. City of New York, 160 App. Div., 491, (1914).

It is respectfully submitted that the employer should have a clean-cut decision of this court as to its rights under the garnishee law, so that it may know, when demands are made upon it for a portion of the wages of its employees under the garnishee law, whether it may properly pay the sums demanded or must make such payment at its peril. Plaintiff in error has here a property right, and a right to contract, which is also property, both of which may not be taken from it without due process of law. It is to secure a decision of this court of last resort whether or not the method of taking this property and of impairing this contract right is due process of law under the State and Federal constitutions that the plaintiff in error has honestly and in good faith contested this matter and has raised the constitutional questions appearing in the issues of this case and set forth in this brief.

2. It is the duty of the employer to defend its employee when his constitutional rights are infringed by the operation of the garnishee law.

A. The interests of employer and employee are so close that what affects the welfare of one affects the other.

If any part of the wages of employees in excess of $12.00 per week can be reached by garnishment irrespective of the amount of such wages and of the needs of the worker's family, it is an invitation to unscrupulous tradesmen to take advantage of the employee, extending him credit for unnecessary articles sold at exorbitant prices.

Is there any question but that the garnishee law as it now operates makes for extravagance, waste and, in the end, distress on the part of the worker and his family, in whose interests society should be more concerned than in the interests of unduly eager and grasping salesmen and vendors. Once it is established that the wages of an employee may not be taken by garnishment until the employee has had an opportunity to appear before a judge or a court and state the needs of himself and his family, there will be less credit extended to working people for the exorbitant purchase price of unnecessary articles which have been induced to purchase by fluent salesmen upon flattering promises of easy terms and extended credit.

The employer has an interest in the welfare of its workers. Any policy which tends to distract them from their duties, and to impair their efficiency by cares and anxieties, and the garnishment of wages is not among the least of these,—affects the employer financially quite as much as though the loss in efficiency caused by this extravagance had been paid for by it directly. It is submitted that this interest of the employer in the welfare of its workers and in the well being of those in the community where it conducts its business is as much property as money itself, and that the deprivation of the employer of this property, resulting from the inefficiency of its workers is as much a deprivation without due process of law as though it had been directly by confiscation.

B. The garnishee law provides that in the event of the failure of an employer to honor garnishee executions the judgment creditor may

have an action directly against the employer himself. Surely, the employer has an interest in this action as well as the worker, having been made the defendant therein by specific provision of the statute, Moreover, the employee has no notice of the garnishment of his wages until a deduction has been made therefrom by the employer in pursuance of some execution under the garnishee statute, and if the employer refuses to honor the garnishee execution, the employee has no notice even then that his rights are at stake and are being jeopardized, unless it be called to his attention voluntarily by the employer. The garnishee law expressly provides that the proceedings for garnishment of wages may be taken without notice to debtor employee and does not provide that when action has been brought against an employer for failure to honor garnishee executions the employee shall be made a party thereto or be given notice thereof. He cannot, therefore, be said to have waived any rights by reason of his failure to appear in the garnishee action and defend himself.

The Case of Duffy v. Morrissey, 82 Misc., (N. Y.) 149, (Albany County Court, 1923) contains the following:

"In the case of Chicago & Alton R. R. Co., appellant, v. Ragland, respondent, 84 Ill. 375, the Court says:

> "A judgment was recovered against appellant, which was paid, appellant failing to claim, for the benefit of its employees, the exemption granted by this section. It is insisted, appellant had no concern with this matter, and their paymaster had no knowledge of the domestic relations of appellee.

"It appears, however, that other employees of the railroad company did know the fact, and it was quite easy for all the officers of the company having active connection with all the employees, to know it. It is a very easy matter, attended with no trouble or expense, to make the inquiry of everyone, when employed, if he has a family and residing with it, and to enter on the payroll the word "family." We are inclined to think a railroad company should take an interest in the well-being of all its employees, and concede to them and obtain for them all the advantages the law gives them. They are generally poor men, not well informed of their rights, and it would not be in derogation of the higher position occupied by the corporation, to save and protect their interests in all cases, especially when it can be done without trouble and expense to the corporation. Such a disposition, when manifested, cannot fail to render the relations existing between employer and employee more agreeable, and perhaps more profitable, and this in all cases of employer and employee.

"To the same effect are the cases of Cooper v. McClun, 16 Ill. 435; Bliss v. Smith, 78 id. 359; Hoffman v. Fitzwilliam & Sons, 81 id. 521."

IV.

A garnishee execution should be deemed a new proceeding, requiring notice to all parties whose rights will be affected, not only from the nature of this proceeding itself, but also from its analogy to similar proceedings for like purpose.

It is recognized that an ordinary execution against property is a remedial process, following entry of judgment as matter of course, and not requiring notice to the judgment debtor. The

return of an ordinary execution against property unsatisfied is presumptive evidence that the judgment debtor has no property exempt from execution, and this remedial process is therefore at an end.

Legal procedure and practice in most jurisdictions provide one or more forms of special proceedings to supplement the process of ordinary execution above referred to. Such special proceedings differ materially from the ordinary execution. They are usually instituted by making new application to the courts for some form of relief, and sooner or later require notice to the judgment debtor.

In the State of New York, there are at least two distinct remedies of this nature, to wit, the judgment creditor's action and proceedings supplementary to execution. In the former, the debtor of course *has notice* by required service upon him of the summons, whether with or without a bill of complaint, and he again has opportunity to have his day in court; in the latter, upon order of the court *served upon him personally* he may be required to appear before a referee appointed by the order at a specified time and place and to answer as to his property. If property is discovered, a receiver may be appointed, but *only upon notice* to the judgment debtor.

Each of these seems to be recognized as a *new* and *independent proceeding requiring notice.*

By analogy, a garnishee execution should beyond question be deemed a new proceeding requiring notice.

The judgment creditor's action and proceedings supplementary to execution have long been part of the legal procedure of the State of New York. The conditions which precede either are the same as those which precede the issuance of a garnishee execution, and the latter should be interpreted and construed in the light of the two first named.

"The policy of the state, as evidenced by prior acts is material in the exposition of statutes. (*Behn v. People,* 17 N. Y., 516; *in re N. Y. etc., R. Co.,* 193 N. Y., 72; *Zeigler v. Corwin,* 12 App. Div., 60). It is assumed that the legislature will not abolish a long standing policy without using explicit words to show its intention. (*In re N. Y. etc., R. Co.,* 193 N. Y., 72.) Hence, where a contrary intention does not appear, that construction will be given a statute which accords with prior legislative policy on the same question. (*Washington Cemetery v. Prospect Park, etc., R. Co.,* 7 Hun, 655 aff'd. 68 N. Y., 591)."

Vol. 1, McKinney's Consolidated Laws of New York, Sec. 97.

1. Judgment-creditor's actions in New York.

Judgment-creditor's actions, so-called, were authorized and the procedure thereunder regulated by Sections 1871 to 1879, inclusive, of the New York Code of Civil Procedure. Most of these sections unchanged, and the rest of them with the substance unchanged, were incorporated in the New York Civil Practice Act as Sections 1189 to 1196, inclusive, and are grouped under Article 72 thereof under the title of "Actions By Judgment Creditors."

A Judgment-creditor's action, as defined by these sections, can be maintained only after an execution against the property of the judgment-debtor has been issued out of a court of record and has been returned wholly or partly unsatisfied.

Code of Civil Procedure, Sec. 1871.

Civil Practice Act, Sec. 1189.

In such actions the final judgment may provide for the satisfaction of the sum due to the plaintiff

> "out of any money, thing in action or other personal property belonging to or due to the judgment-debtor or held in trust for him which is discovered in the action; whether the same might or might not have been originally taken by virtue of an execution" (*Code of Civil Procedure, Sec.* 1873; *Civil Practice Act,* 1191).

except, however, that it expressly forbids the seizure of, or other interference with

> "any property which is expressly exempted by law from levy and sale by virtue of execution * * * *or the earnings of the judgment-debtor for his personal services rendered within sixty days next before the commencement of the action, where it is made to appear by his oath or otherwise that those earnings are necessary for use of a family wholly or partly supported by his labor*" (Italics ours). (*Code of Civil Procedure, Sec.* 1879; *Civil Practice Act, Sec.* 1196).

2. *Proceedings supplementary to execution in New York.*

Proceedings supplementary to execution were authorized and procedure thereunder regulated by Sections 2432 to 2471, inclusive, of the New York Code of Civil Procedure. Most of these sections unchanged, and the rest of them with the substance unchanged, were incorporated in the New York Civil Practice Act as Sections 773 to 813, inclusive.

Proceedings supplementary to execution can be maintained only after execution against property of the judgment-debtor has been issued.

Code of Civil Procedure, Sec. 2432.

Civil Practice Act, Sec. 773.

The proceeding is not usually undertaken until after the return of an execution unsatisfied.

As in judgment-creditor's actions, there is the express provision forbidding the seizure of, or other interference with property exempt by law from levy and sale by virtue of an execution and also

> *"earnings of a judgment-debtor for his personal services, rendered within sixty days, next before the institution of the special proceeding; when it is made to appear by his oath or otherwise, that those earnings are necessary for use of a family wholly or partly supported by his labor."*

3. Similarities and dissimilarities of the three remedies.

A. As to conditions precedent.

Procedure which must be taken before the creditor can take advantage of the special remedy is the same in all three, *viz:* Entry of judgment, issuance of execution against property, return of execution wholly or partly unsatisfied, or inability to realize under ordinary execution.

B. As to extent of exemptions in the case of householders.

The law for garnishee executions purports to authorize the taking of one-tenth of the wages and earnings of an employee in the hands of an em-

ployer at the time of the service of the execution, wheras, in both the judgment-creditor's action and in proceedings supplementary to execution, the earnings of the judgment-debtor for personal services rendered within sixty days before commencement of action or the proceedings cannot be reached, if it is made to appear by oath or otherwise, that those earnings are necessary for use of a family wholly or partly supported by his labor.

C. As to notice to judgment-debtor.

Application for an order for a garnishee execution, or for a garnishee execution can be made *without notice* to the judgment-debtor.

In the commencement of a judgment-creditor's action, summons must necessarily be served upon the judgment-debtor; he has an opportunity to defend, an opportunity to show that he has a family which needs his earnings for its support, and upon entry of judgment he or his attorney would be entitled to notice thereof.

In proceedings supplementary to execution, proceedings are begun by service of a notice and copy of the order upon the judgment-debtor. He is given an opportunity to state what property he has and whether he has a family dependent upon him for support. If property is discovered and a receiver is to be appointed, he is entitled to two days' notice of application for appointment of such receiver, which must be served upon him personally,—service upon his attorney being insufficient.

On the contrary, in proceedings for procuring the issuance and service of a garnishee execution, it is expressly stated that the application may be

made "without notice to the judgment debtor"; there is no opportunity for him to appear and explain that his entire wages are needed for use of his family, and even if there were an opportunity, no discretionary power is vested in the judge, justice or court to whom the application is made, and he *must issue* the order or the execution directing the delivery of one-tenth of the judgment-debtors' wages to the officer serving the execution.

Is there any reason why the proceeding for issuance of a garnishee execution is not a new proceeding requiring notice to the debtor, in the same sense that a judgment creditor's action is a new action, and supplementary proceedings is a new or special proceeding, for both of which notice in every step is required?

Why, in a garnishee execution proceeding, should a penniless debtor be deprived of opportunity of showing that his earnings in the future as they shall accrue are all needed for the future support of his family, when in supplementary proceedings and in a judgment creditor's action he not only has the right to have notice and to appear but on showing its necessity for the future wants of his family, can retain his entire earnings for sixty days prior to the commencement of the action or proceeding.

The judgment of the Supreme Court of the State of New York should be reversed with costs.

Respectfully submitted,

MAURICE E. PAGE,

Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 291.

ENDICOTT-JOHNSON CORPORATION

Plaintiff in Error

vs

ENCYCLOPEDIA PRESS, INC.

Defendant in Error

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF of DEFENDANT IN ERROR

STATEMENT

The plaintiff in error seeks to review a decision of the highest court of the State of New York affirming judgments of the lower court in favor of the defendant in error arising out of the failure and refusal of the plaintiff in error, Endicott-Johnson Corporation, to pay to the Sheriff of Broome County ten per cent. of the wages of Joseph W. Minehan, an employee of such corporation, as directed in a garnishee execution issued under the provisions of §1391 of the Code of Civil Procedure of the State of New York (now re-enacted as §684 of the Civil Practice Act).

The defendant in error here had previously procured a judgment against said Minehan and had issued thereon a property execution, which was returned unsatisfied. Thereafter an order for the issuance of a garnishee execution against the wages of Minehan was granted and the execution served upon the Endicott-Johnson Corporation.

Under the provisions of the Garnishee Statute it was the duty of the Endicott-Johnson Corporation to pay over to the officer presenting the execution the percentage of the wages as therein called for.

The action in the New York courts was based upon that provision of the Garnishee Statute reading as follows:

> "If such person or corporation, municipal or otherwise, to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the percentage of such indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution."

The claims of the plaintiff in error upon this appeal are summarized on page 8 of its brief in this court as follows:

> "The trial court erred in that it did not as matter of law dismiss the complaint and direct judgment for the defendant,
>
> "*First*: because the said Garnishee Law is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.
>
> *Second*: because such law is contrary to public policy and therefore void."

POINT I.

No Federal question is presented or properly raised by the Plaintiff in Error on this Appeal.

§1391 of the former Code of Civil Procedure of the State of New York (now §684 of the Civil Practice Act), as amended by Laws of 1919, Chap. 278, and in effect at the time of the issuance of the garnishee execution here in question, read in part as follows:

> §1391. *Additional Exemptions of Personal Property; Executions against Wages and other Increment.*
>
> In addition to the exemptions, allowed by the last section, necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, together with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family as a domestic or for the purchase money of one or more articles, except as prescribed in this or the last section. Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said

judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof must issue, or of a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided, but only one execution against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor shall be satisfied at one time and where more than one execution has been issued or shall be issued pursuant to the provisions of this section against the same judgment debtor, they shall be satisfied in the order of priority in which such executions are presented******

Either party may apply at any time to the court from which such execution shall issue, or to any judge or justice issuing the same, or to the county judge of the county, and in any county where there is no county judge, to any justice of the City Court upon such notice to the other party as such court, judge, or justice shall direct for a modification of said execution, and upon such

hearing the said court, judge or justice may make such modification of said execution, as shall be deemed just******"

Neither the employer, Endicott-Johnson Corporation, nor the judgment debtor, Joseph W. Minehan, made any motion to modify or set aside, or vacate the garnishee execution, or the order upon which it was founded.

No evidence whatever was offered by the plaintiff in error to show, and no claim was made, that compliance with the garnishee execution would have resulted in any financial loss or financial damage to it.

§1391 of the Code of Civil Procedure further provides that it shall be the duty of the employer to pay over to the officer presenting the garnishee execution during the time such execution shall be in force the percentage of the wages as called for, and that "such payment shall be a bar to any action therefor by any such judgment debtor."

The decision sought to be reviewed is reported below under the title of "Encyclopedia Press, Inc., respondent, against Endicott-Johnson Corporation, appellant," in 234 N. Y. 627, and it appears therefrom that the judgments of the lower courts were unanimously affirmed by the New York Court of Appeals, without opinion.

So far as appears in the record, the judgment debtor, Joseph W. Minehan, may have been and undoubtedly was perfectly satisfied to have the judgment obtained against him by the defendant in error paid off in weekly instalments by a deduction of 10% of

his wages made by his employer, and paid over to the officer presenting the garnishee execution. He was the only person whose property or property rights were taken or affected by the enforcement of this garnishee execution. He made no motion to vacate or modify the order. He is not a party to this action, and so far as the record discloses, will not and can not be affected by the result. He has not rebelled and has not sought to question the right and duty of his employer to make the deduction from his wages as directed by such execution. If the weekly deduction has been made by his employer, the judgment debtor has acquiesced therein. If such deduction has not been made, the employer will be out of pocket only because of its wilful refusal to comply with the directions of the garnishee execution. The remedy of the judgment debtor, had he sought to question the validity of the execution, or the constitutionality of the garnishee statute, was to move to vacate the order for the garnishee and thus bring up the constitutionality of the statute if he so desired (Laird vs Carton, 196 N. Y. 169). Neither was any such motion made by the plaintiff in error, although we question the right of such corporation to raise the constitutionality of the garnishee statute by a direct motion in its own behalf to vacate or modify the order. In any event, no such motion was made, either by the judgment debtor or by the employer. The employer has allowed the garnishee execution to run its course and upon being sued for the accrued amount due has defended such action and attempted in its own behalf and on its own initiative to raise the question of the constitutionality of the garnishee statute. But there is no suggestion contained in the record and no finding has been made or

could be made that the plaintiff in error is in any respect adversely affected by the enforcement of the garnishee.

No property or other right of the plaintiff in error is invaded by its compliance with the terms of the garnishee execution, and neither the agreed facts nor the findings warrant any such inference. It is therefore clear that the plaintiff in error has not caused it to appear that any of its rights are infringed. Without any such showing the plaintiff in error can not raise in this court the questions sought to be reviewed in this case.

Had the plaintiff in error desired to properly question the constitutionality of this statute, it should have secured the permission of the judgment debtor, Minehan, and moved in his name and in his behalf to vacate the order for the garnishee, so that the only party affected thereby would have been before the court.

The courts will not listen to any objection that a statute is unconstitutional unless the person raising the question has some property or other right which is necessarily involved in the determination and which will necessarily be affected thereby. One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity.

Cooley on Const. Lim. (6th Ed.) 196.

Albany County Suprs. vs Stanley, 105 U. S. 305.

Clark vs Kansas City, 176 U. S. 114, 118.

Lampasas vs. Bell, 180 U. S. 276, 283.

Red River Valley Nat. Bank vs. Craig, 181 U. S. 548, 558.

POINT II.

The New York law providing for garnishment of wages is not repugnant to the fourteenth amendment to the Constitution of the United States, and is not contrary to public policy.

If the New York Garnishee Statute violates the provisions of the Fourteenth Amendment, it must necessarily also violate §6 of Article I. of the Constitution of the State of New York, containing a provision that no person shall be deprived of property without due process of law.

That the Garnishee Statute does not violate the Constitution of the State of New York, and is therefore not in conflict with the Fourteenth Amendment to the Federal Constitution, has long been settled within such state.

The Garnishee Act, so-called, originated in Chap. 461 of the Laws of 1903, being an amendment to §1391 of the Code of Civil Procedure, and the Act was amended by Laws of 1905, Chap. 175; Laws of 1908, Chap. 148; Laws of 1911, Chaps. 489 and 532: Laws of 1914, Chap. 352; Laws of 1919, Chap. 278 and Laws of 1920, Chap. 497 (the last amendment being after the garnishee execution in question was issued).

The Statute as now in force constitutes §684 of the Civil Practice Act of the State of New York. In the period of more than twenty years that this statute has been in force, it has received judicial construction and interpretation by the courts of that state, and it was supposed by both bench and bar that the constitutionality of the garnishee statute was settled beyond

peradventure. Indeed, the Trial Justice disposed of the question in these words (Fol. 42):

> "The second and third objections are that the Garnishee Law so-called, under which this action is brought is against public policy and that the provisions of such Act are unconstitutional. It is sufficient answer to this to state that both of these questions have been passed upon by the Court of Appeals in this State and the constitutionality and validity of such Act has been sustained.
>
> Laird vs Carton, 196 N. Y. 169.
>
> Brearley School vs. Ward, 201 N. Y. 358.
>
> I therefore pass these three objections without further comment."

In Laird vs Carton, supra, decided in 1909, the appeal was from an order of the Appellate Division, First Department, reversing an order of the Special Term, denying a motion to set aside a garnishee execution because the judgment sought to be collected thereby was obtained prior to September 1, 1908, the date on which the amendment to Section 1391 of the Code of Civil Procedure, (Laws 1908, Chap. 148, and applicable to that decision) took effect, authorizing such an execution on any money judgment. It was claimed that the Statute could not be retroactive and that it impaired the obligation of contracts, but the Court of Appeals held that this Statute was remedial in its character and valid, as shown by the following quotation in the opinion of Bartlett, J., at pages 172 and 173:

> "The constitutional authorization for its issuance (i. e. a garnishee execution) *does not impair the obligation of any contract* or affect any vested right; it merely furnished the judgment

> creditor with a broader and more effective remedy than the law gave him before. *To this there is no constitutional objection.* Such an application of the statute is not so much retroactive as active upon an existing condition of things, to wit, existing judgments which are yet to be enforced by execution."

The court also quoted with approval from Fisher vs. Hervey (6 Col. 16), where the same question was presented and it was held that the statute was remedial in its character and should be *liberally construed* for the advancement of the remedy.

In Brearley School vs. Ward, supra, decided in 1911, the constitutionality of the statute was squarely attacked. In that case the garnishee execution was sought to reach the income derived from a trust fund, which trust fund was created by a will probated prior to the passage of the statute. It was urged in opposition that to so apply the Act would be unconstitutional as impairing the obligation of a contract and as depriving the beneficiary of the trust of a vested right (P. 361). The opinion in this case was also written by Judge Bartlett, and he very ably takes up in detail this statute, its purpose and effect, and the court holds in that case that no contracts are impaired by the enforcement of this garnishee and there is no deprivation of property without due process of law (P. 371). We quote from the opinion pages 372 and 373:

> "There is recognized in every civilized country the obligation of a man to pay his debts if he has property out of which they can be satisfied, and the failure to do so is moral dishonesty. No one has a moral right to be dishonest. The income of the defendant in this case exceeds $3000.

a year. It is idle to say that the beneficiary can not support himself or his family on less than that sum. It is only a small proportion of the people in this country who have such an income, and yet the vast majority of them live and support themselves and their families and notwithstanding pay their debts. Under the Statute the earnings of the wage earner exceeding $12.00 a week are subject to the same sort of execution that has been issued in this case against the income of the defendant, and it would be very unfortunate if we were constrained to hold that the income from property held in trust for a debtor, often an idle member of society, should be more secure than that income which a man produces by his own toil and efforts. The decisions of the courts lead us to no such result."

The opinion of Judge Bartlett was concurred in by the majority of the court, two of the judges concurring with Judge Gray in a dissenting opinion, arguing that the Statute could not be applied to trust funds created prior to the enactment of the amendment in 1908. Not a single one of the Judges of this court thought that the statute was unconstitutional in any respect when applied to judgments or trust funds obtained or created after the passage of the Act.

The Court of Appeals certainly could not have made the decisions in these two cases upholding the garnishee law (Laird vs. Carton and Brearley School vs. Ward, supra) without necessarily determining that the Statute as applied to judgments obtained *after* its enactment, was valid and constitutional in all respects.

The decisions of the court in these two cases are treated by text writers as conclusive of the issues in this

present action. See Note in Anno. Cas. 1912-B, pp. 251-262, where it is stated (p. 262).

> "By the New York Statutes a debtor's wages were formerly exempted from execution except on judgments recovered wholly for necessaries sold or work performed as a domestic or for salary owing to an employee of the debtor. The Statutes were amended so that an execution could be issued on any money judgment. This amendment has been held to be constitutional," (Citing Laird vs. Carton, Supra, et al).

In a recent work by Charles R. Kreidler entitled "Garnishee Executions and Supplementary Proceedings", beginning at page 9, several pages are devoted to the subject of the constitutionality of §1391 of the Code of Civil Proceedure as regards garnishee executions. After reviewing the history of the statute as interpreted by the courts, the author says at p. 12:

> "It is plain that the constitutionality of the Statute is now beyond dispute."

Where a judgment against an employee is regularly recovered and valid, and execution is returned unsatisfied, a garnishee proceeding, under Code of Civil Proc.. Sec. 1391, now Civil Practice Act, Sec. 684, being a remedial process, without notice to the judgment debtor, and upon satisfactory proof of the required facts, to collect the amount due on the judgment, with the right in either party at any time to apply for a modification of the execution, is not unconstitutional, nor does it offend public policy.

> Smith vs. Endicott-Johnson Corporation, 199 App. Div. 194; aff'd. without opinion 234 N. Y. 628.

In the words of Judge Andrews, writing for a unanimous court in Starke vs. Beckwith Special Agency, 227 N. Y. 42, 43:

> "An execution directed against the wages or salary of a judgment debtor upon presentation to the employer becomes a lien to the amount specified upon the wages or salary of the employee as they become due. The employer must then pay the prescribed amount; and if he fails to do so he becomes liable to the judgment creditor."

The criticisms made by the plaintiff in error of the garnishee law in its efforts to undermine this remedial statute, are clearly frivolous and need no extended answer. A man not only owes it to society to support his family, but also to pay his just debts if he has or acquires property out of which they can be satisfied.

The various State Legislatures have from time to time acting under principles of public policy enacted statutes granting certain exemptions to judgment debtors. From time to time those statutes have been changed, modified and supplemented. Concededly, these statutes find support in public policy; but it does not follow, that public policy prevents any Legislature from repealing or making such changes in the exemption statutes as from time to time it may deem proper. Public policy may be invoked in support of an exemption statute, but not to prevent its repeal or revision.

The Garnishee Statute operates only after a final judgment has been recovered, after an execution against property has been returned unsatisfied, and after it has been established to the

satisfaction of the judge granting the order, that the judgment debtor is employed in a lucrative position or has other income applicable to the payment of his debts. An order is then made requiring the application of 10% of the wages or income in any week where it equals or exceeds $12.00 per week. This allows a judgment debtor to retain 90% of his salary or income in every instance, and all of it in any week wherein it is less than $12.00. Only one garnishee execution can be enforced at any one time. It is therefore absurd to say that no allowance is made for varying conditions.

If reference to the suggestion that no allowance is made for the increased cost of living, such a claim should be addressed to the Legislature, and not to the courts, for the law-making body having seen fit to enact that a creditor may reach 10% of the wages of his judgment debtor, where he earns $12.00 or more per week, it is not for the court to say that such minimum limit should be raised or lowered.

No property is taken from a judgment debtor without due notice, or without due process of law. The judgment debtor has personal notice of the action resulting in the final judgment. He has notice and has an opportunity to pay when the Sheriff comes with the execution against property. He necessarily has notice through his employer of the garnishee execution when it commences to operate. The judgment debtor may move to vacate or modify the order for the garnishee, but after the creditor has resorted to his action and has obtained his final judgment, has failed to collect under execution against property, and has satisfied the court that the judgment debtor has salary or other income of which 10% is applicable to the pay-

ment of his judgment, the legislature wisely permits the garnishee order to issue and throws the burden of modifying or vacating the order on the shoulders of the person upon whom the burden then properly belongs, viz: the judgment debtor. He can have the order for the garnishee either modified or vacated upon a proper showing.

The Garnishee Statute impairs no obligation of the contract between the employer and employee. It is the settled doctrine that the "impairment of a contract" clause in the Constitution applies only to legislation subsequent in time to the contract alleged to have been impaired.

Munday vs. Wisconsin T. Co., 252 U. S. 499.
Cross Lake Shooting & Fishing Club vs. Louisana, 224 U. S. 632, 639.

Under Section 1391 of the New York Code of Civil Procedure, a garnishee execution may be issued against the wages, debts, earnings and salary of officers or employees of any city or of any county of the State, or of the Board of Education of any such city.

If the wages or salary of public officers and employees are lawfully subject to garnishment, a private individual has no just cause for complaint.

It has been broadly stated that statutes authorizing garnishment of the salary or wages of public officials or employees are within the legislative power. Thus, Michigan Act 257, Public Acts of 1899, amending §25, Act No. 137, Laws 1849, which subjected the salaries of municipal corporations to garnishment was declared in Dunkley vs. Marquette (1909) 157 Mich.

339; 122 N. W. 126; 17 Anno. Cas. 523, to be "clearly within the legislative power", and the Act was applied in the case of a city comptroller. And in Trow vs. Moody (1915) 27 Cal. App. 403, 150 Pac. 77, it was held that California Code Civ. Proc. §710, which subjected the salaries of public officers other than those holding "constitutional offices" to garnishment, was "a valid exercise of legislative power", and gave direct authority for subjecting the salary of a deputy city treasurer to garnishment. And in Stockard vs. Hamilton (1919) 25 N. M. 240, 180 Pac. 294, the court overruled the general contention that New Mexico Laws 1917, Chap. 18, which subjected the salaries of legislative officers to garnishment, was unconstitutional, and decreed that the salary of a district attorney could be garnished.

The power of a legislature to determine its own public policy in respect of legislative officers as distinguished from constitutional officers, by subjecting their salaries to garnishee process, was upheld in Ruperich vs Baehr (1904) 142 Cal. 190, 75 Pac. 782, wherein the court said:

> "It may be conceded that it is as much against public policy to subject the salaries of public officers and employes to garnishee process as it is to subject the public funds to such process, or the public property to liens or executions. The legislature, however, undoubtedly, has the power to determine its own policy on this subject with respect to the offices, officers and employes within its control. We are not here concerned with constitutional offices and officers, and we do not wish to be understood as holding that the act under discussion can be applied to them. But with respect to those within legislative control, if it fairly appears that by this act, properly con-

> strued the legislative intent to declare, as its policy, that the salaries or wages may be thus diverted to the payment of debts of such officers and employes, is manifested by the language used, then the courts are bound by this declared policy with respect to the officers to whom it can be applied, and the rule of construction above mentioned becomes to that extent inapplicable."

In Lawson vs. Lawson (1910) 158 Cal. 446; 111 Pac. 354, the court said that the question of the wisdom of the policy of the legislature in subjecting the salaries of legislative officers to garnishee process "is not one within the province of the Courts."

In Dunkley vs. Marquette, 157 Mich. 339, referring to a statute subjecting the salaries of municipal officers to garnishment, the court said: "We are not concerned with the wisdom of the legislation".

In Petersen vs. Jersey City (1916) 89 N. J. L. 93; 97 Atl. 963, referring to a statute permitting the salary of a municipal officer to be garnisheed, the court said:

> "It is not the function of the court to consider whether this matter was wisely determined. That was a legislative question, and the suggestion that it was unwisely determined does not authorize us to withhold from the language of the law as it was passed by the legislature, such import as it reasonably bears."

In Stockard vs Hamilton, 25 N. M. 240, referring to New Mexico Laws 1917, Chap 18, which provided for garnishment of the salaries of public officers, the court said that, "unless the act was contrary and re-

pugnant to the constitutional provisions, it was bound to uphold the law, as it is for the legislative branch of the government to determine the public policy of the state, and not for the judicial."

In Cavender vs. Hewitt, 145 Tenn. 471; 239 S. W. 767 it was held that a statute permitting garnishment of the wages of municipal and county employes which does not extend to those of the state, does not conflict with a constitutional provision against class legislation; that in the absence of statutory prohibition, the legislature has exclusive and ample power to determine the state's policy; that the declaration of the legislature, within its constitutional powers is the public policy of the state; that the legislature has a wide range of discretion in distinguishing, selecting and classifying objects of legislation, and that the act would be upheld as against the contention that it constituted vicious class legislation, deprived persons of their property without due process of law under the state constitution and deprived individuals of their rights, privileges, immunities and exemptions granted to others, and that it violated the 14th Amendment to the Constitution of the United States, which prohibits any state from depriving any person of his property without due process of law.

The questions attempted to be raised by the plaintiff in error under the Federal Constitution are precisely the same as were attempted to be raised in the state court because the questions relate to the proper construction of a statute of the State of New York and its validity under the Constitution of such state. But

these are questions of local law, the decision of which by the highest court of the State is controlling.

First Nat. Bank vs. Ayers, 160 U. S. 660, 664.

Lindsley vs. Nat. Carbonic Gas Co., 220 U. S. 61, 73.

Price vs. Illinois, 238 U. S. 446, 451.

DesMoines Nat. Bank vs. Fairweather, U. S. Sup. Ct. Adv. Ops. Oct. Term 1923, p. 71.

Respectfully submitted that the judgment of the Court of Appeals of the State of New York should be affirmed, with costs.

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